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# Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking

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## ENHANCING AUTONOMY FOR BATTERED WOMEN: LESSONS FROM NAVAJO PEACEMAKING

Donna Coker<sup>\*</sup>

*In this Article, Professor Donna Coker employs original empirical research to investigate the use of Navajo Peacemaking in cases involving domestic violence. Her analysis includes an examination of Navajo women's status and the impact of internal colonization. Many advocates for battered women worry that informal adjudication methods such as Peacemaking ignore domestic hierarchies of power and thus facilitate the batterer's ongoing violence against the victim. Those who endorse the use of Navajo Peacemaking and other systems of restorative justice believe that such processes are better equipped to cut through the batterer's denial and victim blaming and are more likely to marshal resources for the victim than are formal methods of adjudication. Coker argues that both formal and informal methods of adjudication should be assessed for the likelihood that they will realize change in the material and social conditions that foster battering. Coker's study of Peacemaking finds that it may be autonomy enhancing for some battered women because it effectuates such change. Peacemakers may disrupt*

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social and familial supports for battering through confrontations with both the batterer and his family. Women's material resources may be improved through *nalyeeh* (reparations) from the abuser's family and through connections to community social services. Peacemakers use traditional Navajo stories with gender antisubordination themes that may change the way in which the batterer and his family understand the batterer's relationship with the victim. Further, unlike the normative practices of many legal and social service organizations, Peacemaking may avoid the cultural and legal focus on the necessity of a woman's commitment to separating from her abuser. Similarly, peacemakers do not discount women's various competing loyalties and thus do not demand that women choose their identity as "battered woman" over that of other competing identities. Further, Peacemaking avoids the "responsibility versus description dichotomy" of Anglo adjudication by creating a forum in which the oppressive systems that impact the life of the batterer, including systems of racism and colonization, are recognized without minimizing the harm done the battered woman and without blaming her for the batterer's violence. While Peacemaking offers benefits for some battered women, Coker warns that Peacemaking also presents problems: Some women are coerced into participation, agreements are difficult to enforce, and some peacemakers have a promarriage bias that discourages separation. Coker concludes by suggesting an informal adjudication method that draws on the strengths of Peacemaking but that corrects for the coercion problems and strengthens antimisogynist norms. In an Appendix, Coker discusses the limitations of her empirical work that concern the generalizability of her findings (the "empiricism problem") and the difficulties of crosscultural study (the "imperialism problem").

INTRODUCTION AND OVERVIEW: BATTERING AND ANTISUBORDINATION .....	3
I. DOMESTIC VIOLENCE CASES IN PEACEMAKING .....	16
A. Women, Gender, Conquest, and Domestic Violence in the Navajo Nation .....	16
B. Peacemaking: Theory and Practice .....	32
C. Peacemaking's Potential in Domestic Violence Cases: Systemic and Individual Responsibility and Transforming Context .....	38
1. Peacemaking May Address Both Systemic and Personal- Responsibility Aspects of Battering .....	38
a. The Systemic Nature of Battering: Societal and Familial Supports .....	39
b. The Systemic Nature of Battering: Oppression in the Batterer's Life and Peacemaking's Alternative to the "Responsibility Versus Description" Dichotomy .....	50
c. The Systemic Nature of Battering: Battering as a System of Control .....	57
2. Peacemaking May Transform Context and Foster Personal and Social Change Through the Use of Traditional Navajo Stories .....	58

3. Peacemaking May Support “Safe Connection” and Avoid Gender Essentialism..... 67

II. PEACEMAKING AND THE PROBLEMS OF INFORMAL ADJUDICATION ..... 74

A. The Coercion Problem ..... 75

B. The Cheap-Justice Problem..... 85

C. The Normative Problem..... 88

D. The Communitarian/Social-Change Problem..... 96

CONCLUSION: LESSONS FROM NAVAJO PEACEMAKING..... 101

APPENDIX: RESEARCH NOTE ON PROBLEMS OF IMPERIALISM AND EMPIRICISM ..... 107

INTRODUCTION AND OVERVIEW: BATTERING AND ANTISUBORDINATION

Navajo Peacemaking<sup>1</sup> is a form of what is sometimes called “informal adjudication.”<sup>2</sup> As part of the effort to revitalize Navajo common law and

1. I distinguish Navajo Peacemaking from other similar forms of informal adjudication. Formal Peacemaking programs exist in several Native American tribes. See Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 821 (1996). *Ho'oponopono*, an indigenous form of dispute resolution among native Hawaiians, as well as practices among aboriginal people in Australia and New Zealand, may share similarities to Navajo Peacemaking. See, e.g., ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 166–67, 194 (1999) (describing *ho'oponopono*); John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control*, in JUST BOYS DOING BUSINESS? MEN, MASCULINITIES, AND CRIME 189, 192–96 (Tim Newburn & Elizabeth A. Stanko eds., 1994) (explaining that community group conferencing borrows in part from indigenous justice practices); Frederick W.M. McElrea, *The New Zealand Youth Court: A Model for Use with Adults*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 69 (Burt Galaway & Joe Hudson eds., 1996).

2. I include within informal adjudication both civil mediation and criminal restorative justice alternatives such as victim-offender mediation, family or community group conferencing, and sentencing circles. A great deal of feminist and other critical scholarship deals with mediation. See *infra* notes 26, 27. The feminist scholarship related to restorative justice has for the most part focused on particular processes, and several scholars have criticized the use of such processes in domestic violence cases. See, e.g., Stephen Hooper & Ruth Busch, *Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea*, 4 WAIKATO L. REV. 101 (1996); Loretta Frederick, *Why Restorative Justice Issues Are Significant to Us at This Time* (n.d.) (unpublished electronic document, on file with author); Rashmi Goel, *Use of Sentencing Circles in Domestic Violence Cases in Canada* (n.d.) (unpublished manuscript, on file with author). Kathleen Daly's work in republican justice provides a notable exception, as does Martha Minow's preliminary work in examining feminist responses to violent atrocities. See generally Braithwaite & Daly, *supra* note 1; Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH. & LEE L. REV. 431 (1994) [hereinafter Daly, *Criminal Law and Justice System Practices*]; Kathleen Daly, *Men's Violence, Victim Advocacy, and Feminist Redress*, 28 LAW & SOC'Y REV. 777 (1994) [hereinafter Daly, *Men's Violence*]; Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967 (1998). This Article attempts to further a feminist analysis of restorative justice methods through a close examination of Peacemaking, a process

traditional Navajo adjudicatory processes, Peacemaking's importance within the Navajo Nation has grown in recent years.<sup>3</sup> Peacemaking has also been the focus of international<sup>4</sup> and national attention as a form of alternative dispute resolution<sup>5</sup> and, more recently, as a form of restorative justice.<sup>6</sup> This Article builds on original empirical research<sup>7</sup> to investigate the use of Navajo Peacemaking in cases involving domestic violence.<sup>8</sup> My study of Peacemaking practice draws on reviews of Peacemaking Court files<sup>9</sup> in Window Rock,

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frequently described as an example of restorative justice. See, e.g., Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equality and Justice*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 1, at 157, 172. My work follows the concerns that are central to Daly—the intersection of race, class, gender, and state power in understanding crime—and follows Minow's concerns regarding the ability of feminist theory to address society's appropriate response to violence.

3. See *infra* notes 558–564 and accompanying text (asserting that the movement for Peacemaking is part of a political effort to maintain and expand the judicial autonomy and national sovereignty of the Navajo Nation).

4. Scholars and legal practitioners from around the world have visited and studied the Navajo Peacemaking courts. See Raymond D. Austin, *Freedom, Responsibility, and Duty: ADR and the Navajo Peacemaker Court*, JUDGES' J., Spring 1993, at 8, 11.

5. See, e.g., Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993); Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1 (1993); James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 72 (1997) (describing visits from alternative dispute resolution (ADR) experts from New Mexico to study Peacemaking). Many Navajo writers reject the "alternative dispute resolution" category, noting that Peacemaking is actually a form of "original dispute resolution." See *id.* at 55–56.

6. See, e.g., Marianne O. Nielsen, *A Comparison of Developmental Ideologies: Navajo Nation Peacemaker Courts and Canadian Native Justice Committees*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 1, at 207; Mark S. Umbreit, *Humanistic Mediation: A Transformative Journey of Peacemaking*, 14 MEDIATION Q. 201 (1997); Yazzie & Zion, *supra* note 2.

7. To the best of my knowledge, this Article is the first attempt to gather empirical data regarding the use of Peacemaking in domestic violence cases. In the Appendix, I discuss some of the limitations of my methodology and analysis. See *infra* Appendix.

8. My focus is on Peacemaking as an intervention in cases of domestic violence, but my observations regarding Peacemaking have implications beyond this focus. First, Peacemaking practice provides a partial response to criticisms of informal adjudication that focus on the inability of such processes to address the effects of private hierarchies of power. These private hierarchies are particularly pronounced in domestic violence cases but are also at play in many other circumstances. My examination of Peacemaking may also expand the critique of formal adjudication articulated by ADR and restorative justice proponents. This expansion is accomplished largely through the use of insights from critical theory: feminist theory, critical race theory, and critical race feminist theory.

9. The peacemaker files I examined generally contained: (a) a description of the petitioner's complaint; (b) intake notes, including interviews with the petitioner (and sometimes with other family members or supporters who accompanied the petitioner); (c) court documents, including referral orders in court-referred cases; (d) other legal documents (e.g., domestic violence protection orders); and (e) the peacemaker's (often summary) notes of the session and notes of the resolution (adopted as a minute order in court-referred cases). Occasionally, the file contained follow-up documentation. My review of Peacemaking files is designed solely to examine the plausibility

Navajo Nation (Arizona) and in Shiprock, Navajo Nation (New Mexico),<sup>10</sup> observation of a Peacemaking session in Window Rock,<sup>11</sup> and extensive interviews with peacemakers,<sup>12</sup> peacemaker liaisons, family court judges,<sup>13</sup> justices

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of claims made by both detractors and supporters of the use of Peacemaking in domestic violence cases.

The Shiprock Peacemaker Division saw 177 cases in 1996. See Donna Coker, Notes from Shiprock File Review (Apr. 21–22, 1997) (on file with author) [hereinafter Shiprock File Review]. Of these cases, I selected 31 cases that contained domestic violence markers. (I also reviewed a number of non-domestic violence cases for comparison.) Cases were identified as domestic violence marker cases if the file was labeled “domestic violence” (usually meaning the case was a referral from a family court domestic violence protection order proceeding), “family or marital disharmony,” “family or marital counseling,” “divorce,” “child custody/visitation or modification of custody/visitation,” or “alcohol counseling,” or if the file was transferred from a criminal court hearing. See *id.* For purposes of this study, I defined domestic violence as those cases of violence or threat of violence between two adult sexual intimates or former sexual intimates. Of the 31 cases that I reviewed in Shiprock, nine involved verified violence and an additional two contained facts that strongly indicated violence, including threats of violence. See *id.*

In Window Rock, peacemakers heard 192 cases in 1996. See Donna Coker, Notes from Window Rock File Review (Apr. 23–24, 1997) (on file with author) [hereinafter Window Rock File Review]. I reviewed 70 domestic violence marker cases, of which 11 were confirmed domestic violence cases. Thus I reviewed a total of 22 confirmed or probable domestic violence case files. I reviewed the files in chronological order. Though my review was not exhaustive and involved only two Peacemaking Divisions, the small number of domestic violence cases was consistent with the reports I received from family court judges, prosecutors, and anti-domestic violence advocates that very few of these cases were being heard in Peacemaking. However, the small number was somewhat inconsistent with reports from peacemakers who seemed to feel that they were seeing a significant number of cases involving domestic violence. See Interview with Crownpoint Peacemakers, in Crownpoint, Navajo Nation, N.M. (Apr. 15, 1997) (notes on file with author); see also Zion & Yazzie, *supra* note 5, at 80–83 (describing the use of Peacemaking in domestic violence cases).

10. I follow the Navajo Nation’s official method for referring to locales within the Navajo Nation. See NATION CODE tit. 1, § 501(a)–(c) (Equity 1995) (stating that all entities of the Navajo Nation are to use the designation “Navajo Nation” in describing the lands and people of the Navajo Nation,” and that “all correspondence . . . of all divisions, agencies, etc., of the Navajo Nation, [are directed to] use the designation ‘Navajo Nation,’” so, for example, letterheads “should read ‘The Navajo Nation, Window Rock, Navajo Nation (Arizona) 86515’”).

11. See Donna Coker, Notes on Window Rock Peacemaking Session (Apr. 24, 1997) (on file with author) [hereinafter Notes on Peacemaking Session].

12. I interviewed a group of peacemakers in Crownpoint, Navajo Nation (New Mexico): Joe Dennison, Sr., Raymond Gem, Nina Largo, Cecilia J. Nez, Annie Tsosie, and Peacemaker Liaison Imogene Long. See Interview with Crownpoint Peacemakers, *supra* note 9. In Window Rock, I interviewed Peacemaker Liaison Anita Roan, see Interview with Anita Roan, Peacemaker Liaison for Window Rock, in Window Rock, Navajo Nation, Ariz. (Apr. 15, 1997) (notes on file with author), and Peacemaker Ruthie Alexis, see Interview with Ruthie Alexis, Window Rock Peacemaker, in Window Rock, Navajo Nation, Ariz. (Apr. 24, 1997) (notes on file with author). In Shiprock, I interviewed Peacemaker Liaison Leo Natani. See Interview with Leo Natani, Peacemaker Liaison for Shiprock, in Shiprock, Navajo Nation, N.M. (Apr. 21, 1997) (notes on file with author).

13. I interviewed Family Court Judges Mae Horseman, see Interview with Mae Horseman, Family Court Judge, in Crownpoint, Navajo Nation, N.M. (Apr. 15, 1997) (notes on file with author), and Marilou Begay, see Interview with Marilou Begay, Family Court Judge, in Shiprock, Navajo Nation, N.M. (Apr. 21, 1997) (notes on file with author).

of the Supreme Court of the Navajo Nation,<sup>14</sup> the coordinator of the Peacemaker Division,<sup>15</sup> the solicitor general of the Navajo Nation,<sup>16</sup> as well as anti-domestic violence advocates working in the Navajo Nation.<sup>17</sup>

Navajo Peacemaking is a process in which a *Naat'aanii* (peacemaker), familiar with Navajo common law and traditional Navajo stories, guides disputing parties to develop a resolution.<sup>18</sup> A Peacemaking session includes members of the extended families of the disputants and may also include community members with relevant expertise (e.g., alcohol treatment counselors and social workers<sup>19</sup>). Peacemakers understand Peacemaking as a spiri-

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14. I interviewed Chief Justice Robert Yazzie, *see* Interview with Robert Yazzie, Navajo Nation Supreme Court Chief Justice, in Window Rock, Navajo Nation, Ariz. (Apr. 23, 1997) (notes on file with author), and completed an extensive interview with Justice Raymond Austin, *see* Interview with Raymond Austin, Navajo Nation Supreme Court Justice, in Window Rock, Navajo Nation, Ariz. (Apr. 23, 1997) (notes on file with author).

15. I had extensive conversations with Philmer Bluehouse, Coordinator of the Peacemaker Division of the Navajo judiciary. I also attended a training session that Bluehouse conducted for local teachers regarding Navajo cosmology and Peacemaking. *See* Interview with Philmer Bluehouse, Coordinator of the Peacemaker Division of the Judiciary Branch of the Navajo Nation, in Window Rock, Navajo Nation, Ariz. (Apr. 20, 1997) (notes on file with author).

16. I had extensive conversations with James W. Zion, Solicitor General of the Navajo Nation, in person, by mail, and by e-mail.

17. I conducted phone interviews with Cecelia Lowe, Counselor, and Diane Thompson, Director, of Ama Doo Alchini Bighan, Inc. ("Mother and Child Home, Inc.") (A.D.A.B.I.), an anti-domestic violence project in Chinle, Navajo Nation (Ariz.), Genevieve James, a consultant at Mending the Sacred Hoop, and Chris O'Shea, an attorney who assisted in drafting the Navajo Nation Code statute regarding domestic violence protection orders. *See* Telephone Interview with Genevieve James, Consultant, Mending the Sacred Hoop (Apr. 17, 1997) (notes on file with author); Telephone Interview with Chris O'Shea, San Juan County Legal Services Attorney (Mar. 1997). I conducted personal interviews with several anti-domestic violence advocates. *See* Interview with Peggy Bird, former Director of the Native American Family Violence Prevention Project of DNA People's Legal Services and currently faculty/attorney/consultant with Mending the Sacred Hoop, and Jennifer Skeet, former staff attorney for the Judicial Branch of the Navajo Nation and current staff attorney for the Legislative Council of the Navajo Nation, in Shiprock, Navajo Nation, N.M. (Apr. 22, 1997) (notes on file with author) [hereinafter Interview with Peggy Bird and Jennifer Skeet]; Interview with Gloria Champion, Director of the Shiprock Home for Women and Children, in Shiprock, Navajo Nation, N.M. (Apr. 22, 1997) (notes on file with author); Interview with Cheryl Neskahi-Coan, Director of the Family Harmony Project, and Helen Muskett, counselor with the Family Harmony Project, in Shiprock, Navajo Nation, N.M. (Apr. 16, 1997) (notes on file with author) [hereinafter Interview with Cheryl Neskahi-Coan & Helen Muskett] [hereinafter, collectively, Interviews with Battered Women's Advocates]. I also interviewed Donovan Brown, chief prosecutor for the Navajo Nation, and Sharon Tsingine, deputy prosecutor for Window Rock. *See* Interview with Sharon Tsingine, District Prosecutor for Window Rock, and Donovan Brown, Chief Prosecutor for the Navajo Nation, in Window Rock, Navajo Nation, Ariz. (Apr. 23, 1997) (notes on file with author) [hereinafter Interview with Sharon Tsingine & Donovan Brown].

18. I describe this process in much greater detail *infra* Part I.C.

19. *See* Notes on Peacemaking Session, *supra* note 11 (observing a Peacemaking session in which a hospital social worker participated).

tual process in which the primary purpose is the restoration of *hózhó*, roughly (but inadequately) translated as “harmony.”<sup>20</sup>

A significant body of scholarship, much of it written by members of the Navajo judiciary and the solicitor general for the Navajo Nation, describes Peacemaking’s use in domestic violence cases.<sup>21</sup> In general, this literature argues that non-Native<sup>22</sup> adjudication would be improved by the application of Navajo concepts of justice and the Navajo process of Peacemaking.<sup>23</sup> Peacemaking proponents argue that Peacemaking, unlike Anglo adjudication, allows parties to reach the underlying problems, diminishes the ability of the offender to deny and minimize his abuse or his responsibility for the abuse, and provides support for the victim.<sup>24</sup>

20. See Zion & Yazzie, *supra* note 5, at 79 (describing *hózhó* as the goal of Peacemaking and defining *hózhó* as “the wholeness of all reality and the connections of everyone and everything”). For further discussion of *hózhó*, see *infra* notes 313–314 and accompanying text.

21. There are many published accounts of the use of Peacemaking in domestic violence cases. See, e.g., Austin, *supra* note 4; The Honorable Robert Yazzie, *Navajo Peacekeeping: Technology and Traditional Indian Law*, 10 ST. THOMAS L. REV. 95 (1997) [hereinafter Yazzie, *Navajo Peacekeeping*]; Yazzie & Zion, *supra* note 2; James W. Zion & Elsie B. Zion, *Hozho’ Sokee’—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993). For general discussions of Peacemaking, see Phil Bluehouse, *Navajo Tradition and Peacemaking Courts*, in NATIONAL CONFERENCE ON TRADITIONAL PEACEMAKING AND MODERN TRIBAL JUSTICE SYSTEMS (sponsored by the Indian Law Support Center and the Native American Bar Association) (1992), *An Interview with Philmer Bluehouse*, in PEOPLE OF THE SEVENTH FIRE 161 (Dagmar Thorpe ed., 1996), The Honorable Robert Yazzie, ‘Hozho Nahasdlii’—*We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996) [hereinafter Yazzie, *Hozho Nahasdlii*], The Honorable Robert Yazzie, “Life Comes from It”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994) [hereinafter Yazzie, *Life Comes from It*], Yazzie & Zion, *supra* note 2, James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265 (1984), and Zion & Yazzie, *supra* note 5.

22. I use the terms “Indian,” “American Indian,” “Native American,” and “Native” interchangeably throughout this Article. The term “Indian” has been adopted by many indigenous people who reside within the geographic borders of the United States. See WARD CHURCHILL, *FROM A NATIVE SON: SELECTED ESSAYS ON INDIGENISM, 1985–1995*, at 457 (1996). Churchill uses such terms as “American Indian,” “Native American,” “first American,” and “original American” interchangeably, noting that “[s]o long as no one resorts to such anthropological monstrosities as ‘Amerindian’ or ‘aborigines’—or the marxian lexicon involving ‘primitives’ and ‘preindustrials’—we tend to be rather semantically contented people.” *Id.* “Indian” is the term used most frequently by people in the Four Corners area (where the Utah, Arizona, New Mexico, and Colorado borders meet). This area, frequently referred to as “Indian Country,” is the location of the Navajo Nation. See also Alan R. Velie, *Indian Identity in the Nineties*, 23 OKLA. CITY U. L. REV. 189, 190 (1998). Velie prefers the term “Indian,” because it is the term that most Indians use, “at least in ‘Indian Country’ . . . and other states with large Indian populations. On the ‘rez’—that is among working class Indians on reservations—‘Indian’ is virtually the only term ever used.” *Id.*

23. See Austin, *supra* note 4, at 48 (writing that the Navajo Peacemaker Court may provide a model for ADR); *An Interview with Philmer Bluehouse*, *supra* note 21, at 167 (arguing that the adversary system of justice is unfair and uses force with force).

24. See Yazzie, *Life Comes from It*, *supra* note 21, at 183.

The involvement of relatives assures that the weak will not be abused and that silent or passive participants will be protected. An abused victim may be afraid to speak; his or her



Many feminist anti-domestic violence scholars and activists have been understandably skeptical of the use of informal processes such as Peacemaking in domestic violence cases.<sup>25</sup> The concerns are that informal methods of adjudication may ignore domestic power hierarchies and thus facilitate the batterer's ongoing violence against the victim, resulting in unfair and coerced "agreements."<sup>26</sup> Informal processes may create an occasion for the batterer, his family, and perhaps even the victim's family, to blame the victim for the batterer's anger, violence, or both.<sup>27</sup> Further, a focus on the particular needs

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relatives will assert and protect that person's interests. The process also deals with the phenomenon of denial where people refuse to face their own behavior.

*Id.* (footnote omitted); see also Zion & Yazzie, *supra* note 5, at 81-82.

25. None of the battered women's advocates in the Navajo Nation whom I interviewed endorsed Peacemaking as it is currently practiced as an intervention in domestic violence cases. See Interviews with Battered Women's Advocates, *supra* note 17. Some advocates believed that with appropriate safeguards and training, Peacemaking might be appropriate for some women, while others believed that either because of changes in Navajo culture that serve to undermine its effectiveness or because of the inherent power imbalance between batterer and victim, Peacemaking could not be reformed to meet the needs of battered women. Similar criticisms have been made of other informal adjudicatory processes. See, e.g., Curt Taylor Griffiths & Ron Hamilton, *Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 1, at 175, 187 (noting that with regard to the use of restorative justice processes, "[a]boriginal women [in Canada] have voiced concerns about the high rates of sexual and physical abuse in communities, and have questioned whether local justice initiatives provide adequate protection for violence and abuse victims and whether the sanctions imposed are appropriate"); Goel, *supra* note 2, at 26 (describing a sentencing circle in which the domestic violence victim was outnumbered and the focus was on the offender and how to help him, not the impact of the abuse on the victim and her children, and noting that the victim spoke only three times, always in response to the judge's questions, and only to acknowledge the concerns and wishes of the community leaders (citing Mary Crnkovich, *Report on a Sentencing Circle in Nunavik*, in INUIT WOMEN AND JUSTICE: PROGRESS REPORT NUMBER ONE 19, 21 (Pauktuutit Inuit Women's Ass'n, 1995))). See generally Hooper & Busch, *supra* note 2 (asserting that family group conferencing as well as other restorative justice approaches are ill-advised in cases involving domestic violence).

26. See, e.g., Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993). By and large, restorative justice proponents have not been feminist or other critical scholars. See Minow, *supra* note 2, at 969. I do not mean to suggest, however, that there is no feminist support for the use of informal adjudication in domestic violence cases. See generally Braithwaite & Daly, *supra* note 1; Daly, *Criminal Law and Justice System Practices*, *supra* note 2; Daly, *Men's Violence*, *supra* note 2. For feminist criticisms of mediation, see Hilary Astor, *Swimming Against the Tide: Keeping Violent Men Out of Mediation*, in WOMEN, MALE VIOLENCE AND THE LAW 147, 158 (Julie Stubbs ed., 1994) ("[Mediation] places fewer barriers between the perpetrator and the target of his violence. It offers opportunities for continued contact with the target of his violence where she may be unprotected and where violence and coercion can continue."); Fischer et al., *supra*; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

27. See, e.g., Fischer et al., *supra* note 26, at 2158; Grillo, *supra* note 26, at 1582-83; Hart, *supra* note 26, at 320; Lerman, *supra* note 26, at 104. A number of mediation programs have devel-

of individual victims and batterers may fail to represent society's substantial interest in preventing domestic violence.<sup>28</sup>

The debate between advocates of formal and informal methods of intervention in domestic violence cases fails to address some of the concerns that are of greatest importance to many battered women.<sup>29</sup> These concerns illuminate Peacemaking's potential benefits for some battered women.<sup>30</sup> The most important of these concerns is the ability of domestic violence intervention strategies to realize change in the material and social conditions that foster battering. Material conditions are implicated both in women's vulnerability to battering and in understanding why some men batter women they purport to love.<sup>31</sup>

The prevalence of violence in women's lives is both reflective of women's subordinate status and constitutive of that status. Widely held misogynist beliefs offer rationales for individual acts of battering.<sup>32</sup> The phenomenon of violence in women's lives contributes to women's marginalization economically,<sup>33</sup> politically, and socially both through the effects of battering on

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oped methods designed to deal with the concerns raised in domestic violence cases. See generally Allan Edward Barsky, *Issues in the Termination of Mediation Due to Abuse*, 13 MEDIATION Q. 19, (1995); Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319 (1997). For a discussion of concerns regarding Peacemaking expressed by battered women's advocates in the Navajo Nation, see *infra* Part II.

28. See Astor, *supra* note 26, at 163 (explaining that because mediation "embodies the qualities of the private"—"intimate, confidential, consensual, caring"—it reinscribes domestic violence as a private problem).

29. I do not argue that Peacemaking is always and for all purposes superior to formal adjudication or that formal adjudication is always and for all purposes superior to Peacemaking. In theory and in practice, each process has both benefits and pitfalls. Some aspects of Peacemaking, conducted with procedural safeguards that I will describe, may better meet some needs of some battered women than do formal processes such as civil protection orders and criminal prosecutions. Also, Peacemaking illuminates some of the difficulties that face women in the predominant legal domestic violence interventions (civil protection orders and criminal adjudication), and aspects of Peacemaking practice provide partial responses to some of the problems they face in other informal adjudication practices.

30. See *infra* Part I.C.

31. My analysis gives no primacy to legal interventions but presumes that legal strategies, like other strategies, should be subjected to a rigorous weighing of costs and benefits. In some respects, this is an argument for the primacy of process, for regardless of their names, programs are better if they make more resources available to more women. See Kathleen Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUS. L. REV. 29, 74-75 (1998) (arguing that "process counts" because "[t]he depression, guilt, and low self-esteem observed in some battered women are often by-products of the ineffective, disempowering responses from the people to whom victims turn for help").

32. See generally David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 176 (Kersti Yllö & Michele Bograd eds., 1988).

33. See generally Jody Raphael, *Domestic Violence and Welfare Receipt: The Unexplored Barrier to Employment*, 3 GEO. J. ON FIGHTING POVERTY 29 (1995) [hereinafter Raphael, *The Unexplored Barrier*] (describing how abusive men sabotage the efforts of women to move from welfare to work);

women's physical and emotional health<sup>34</sup> and through the effects on women's ability to pursue career and educational opportunities.<sup>35</sup> The aim of domestic violence intervention, therefore, should be liberation,<sup>36</sup> and the question to ask of any proposed intervention is whether it can, for some women, provide resources that enhance the possibility of liberation and increase women's autonomy.<sup>37</sup>

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Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201 (1996) [hereinafter Raphael, *Feminist Theory of Welfare Dependency*]; Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, Special Issue, 25 CLEARINGHOUSE REV. 421 (1991) (explaining that battering is a significant cause of homelessness among women).

34. See generally MARY ANN DUTTON, *EMPOWERING AND HEALING THE BATTERED WOMAN* (1992) (arguing that women's experiences of abuse are mediated by their life situation); JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 175-96 (1992); Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (1992) (describing the post-traumatic stress that some battered women experience as a result of abuse).

35. See, e.g., Raphael, *Feminist Theory of Welfare Dependency*, *supra* note 33, at 205 (describing the impact on health care resources and on lost work productivity).

36. Liberation does not necessarily mean the woman will choose to leave the batterer. Rather, interventions are more or less liberating depending on whether they put material, spiritual, and social resources in women's hands. See *infra* Part I.C.3 (discussing how prominent domestic violence legal interventions frequently emphasize separation from the batterer and offer little support to women who "fail" to separate).

37. By liberation and autonomy I do not mean to connote the classical liberal understandings of liberty, or at least I do not mean *only* that. See, e.g., JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 55 (1990) (asserting that positive liberty, often referred to as "autonomy," involves something more than the absence of interference by others that is associated with negative liberty). Rather, I refer to the social conditions required for the maximization of individual choice, recognizing that one of the requisite social conditions is that of community and that individual choice is never truly individual, but rather relational. This relational nature of choice may be especially true in the lives of many women. As Martha Mahoney notes, "[t]heoretical work on motherhood can help reveal the ways agency is not merely either individual or collective in the traditional, political sense, but also shared. . . . The struggles of women with children are not comprehensible within any idea of agency that looks only to any woman's atomistic needs and actions." Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 59, 68-69 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). Increasing women's autonomy, therefore, envisions a positive version of both the state's obligations to its citizens and the individual's obligations to her neighbors. See Kenneth Casebeer, *Running on Empty: Justice Brennan's Plea, the Empty State, the City of Richmond, and the Profession*, 43 U. MIAMI L. REV. 989, 996 (criticizing the "idea that rights, of whatever status, must be purely negative barriers to others' actions, rather than affirmations of obligatory response"). Autonomy is expanded by the creation of social conditions that, to the greatest extent possible, provide care for others and are likely to foster caring and ethical behavior *towards* others. See NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 79-80 (1984) (describing how morality requires both the "natural caring" feeling when we care for someone because we want to and the commitment to care, the "I must," which draws on our "best picture[s] of ourselves caring and being cared for") [hereinafter NODDINGS, *CARING*]. Thus, "moral evil consists in inducing, sustaining, or failing to relieve . . . conditions [of pain, separation, and helplessness]." NEL NODDINGS, *WOMEN AND EVIL* 229 (1989) [hereinafter NODDINGS, *WOMEN AND EVIL*]. I do not minimize the importance of negative rights or formal equality. Braithwaite and

While battering is a phenomenon of gender subordination, it may also be a function of racism, poverty, and conquest.<sup>38</sup> If feminist anti-domestic violence work is to be liberatory, it must recognize the importance of these intersections in women's lives.<sup>39</sup> Ignoring the importance of these oppressive structures in the lives of battered women results in interventions that

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Pettit describe "dominion," a republican and negative sense of liberty that I believe to be necessary but not sufficient for expanding battered women's autonomy. See BRAITHWAITE & PETTIT, *supra*, at 85. (I confess to finding "dominion" to be an unfortunate choice of terms, both because of its association with monarchical rule and because The Dominion, as every Trekkie knows, are the bad guys in *Star Trek: Deep Space Nine*.) Braithwaite and Pettit define dominion as "the social status you perfectly enjoy when you have no less a prospect of liberty than anyone else in your society and when it is common knowledge among you and others that this is so." *Id.* In addition, "you must have the largest prospects of liberty compatible with that [of] equality." *Id.* Dominion, with its embedded concept of equal treatment and maximum noninterference, is a necessary but not sufficient condition for expanding autonomy for battered women. If I am hungry, the fact that everyone else is also hungry does not diminish (by much) the ways in which starvation limits my autonomy. Finally, it must be recognized that promoting autonomy requires a political commitment to social justice. "This political commitment requires people in privileged places to examine their own position . . . [It] requires self-examination, not empathy[, and the] willingness to join in political solidarity with their fellow citizens to create more egalitarian institutions that will erode the positions of privilege that they now enjoy." Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WMS. U. L. REV. 175, 196 (1998) (footnote omitted).

38. See *infra* Parts I.A, I.C.1.b.

39. As critical race feminist scholars have demonstrated, such an understanding is important in evaluating the effectiveness of domestic violence interventions for women of color. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

The problem is not simply that women who dominate the antiviolence movement are different from women of color but that they frequently have power to determine, either through material or rhetorical resources, whether the intersectional differences of women of color will be incorporated at all into the basic formulation of policy.

*Id.* at 1265. For example, the implicit understanding of "client" that informs funding decisions and service program delivery is frequently white. An example of this understanding is found in Crenshaw's now well-known story of a monolingual Spanish-speaking woman who was denied housing in a battered women's shelter because of her inability to participate in the English-language group counseling sessions. See *id.* at 1262-64. The shelter's emphasis on a woman's psychological needs in response to battering creates an implicit normative description of "battered woman." This normative battered woman faces no significant oppression other than that of battering; hence her primary problems, after safety, are psychological. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 595 (1990) (describing the "nuance theory" in "dominance feminist theory" that presumes the commonality of all women while describing differences as "a matter of 'context' or 'magnitude,' that is, nuance"). "The problem with nuance theory is that if black women are defined as 'different,' white women quietly become the norm, or pure, essential woman." *Id.* The assumption in such a program is that services designed for "battered women" are there for those who "but for the battering" would not need services at all. Mahoney describes this kind of reasoning in the compromises in the welfare reform legislation. See Martha Mahoney, Presentation at the American Association of Law Schools National Meeting (Jan. 1997). Thus the struggles and context that define the lives of women of color and poor women are not the focus of intervention because they have already been understood as problems *separate from* the battering experience.

ultimately fail the women whose lives are most affected by those structures: poor women and women of color.<sup>40</sup>

It is also important to recognize the relationship of battering to poverty, racism, and conquest in the lives of some men who batter.<sup>41</sup> Feminist scholarship must explore this connection for several reasons. Interventions that recognize oppressive structures in the lives of battering men may discourage some men from battering. Further, both men and women experience racist and economic oppression. To ignore racist and economic oppression in the lives of men who batter is to ignore their importance in the lives of battered women. Finally, recognition of oppressive structures in the lives of batterers is important because many battered women seek that recognition.<sup>42</sup>

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40. The concern that formal adjudication fails to meet the needs of poor women and women of color is hardly new. Nor is the criticism that many reform efforts designed to serve battered women fail to place the needs of poor women and women of color at the center of analysis. See, e.g., Crenshaw, *supra* note 39, at 1262–65. See generally Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994) [hereinafter Rivera, *Domestic Violence Against Latinas*]; Jenny Rivera, *Intimate Partner Violence Strategies: Models for Community Participation*, 50 ME. L. REV. 283 (1998) [hereinafter Rivera, *Intimate Partner Violence Strategies*]; Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 505 (1996) [hereinafter Rivera, *The Violence Against Women Act*] (“While some supporters have argued that mandatory arrest is itself an empowering mechanism, the lack of information on the experiences of women of color with mandatory arrest policies, belies reliance on prior evaluations of mandatory arrest practices and procedures.” (footnote omitted)). For further discussion, see generally Angela Browne, *Reshaping the Rhetoric: The Nexus of Violence, Poverty, and Minority Status in the Lives of Women and Children in the United States*, 3 GEO. J. ON FIGHTING POVERTY 17 (1995), Lisa R. Green, *Homeless and Battered: Women Abandoned by a Feminist Institution*, 1 UCLA WOMEN'S L.J. 169 (1991) (arguing that battered women's shelters employ essentialist understandings of “battered woman” to refuse assistance to homeless women who are battered), Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071 (1995) (describing the failure of poverty law programs to focus on assisting battered women), and Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991). This elision of context and the existence of an implicit battered woman norm that is white and (often) nonpoor may be most apparent in legal interventions. A strange disjuncture may exist between the lives of many women assisted (or seen) by legal institutions and the framework that legal actors in those institutions bring to understanding the women they see.

41. Despite the disproportionate number of men of color and poor men charged with misdemeanor domestic violence, much of judicial training on domestic violence speaks in gender-only terms. This focus fails to explore the role that antipoor bias and racism might play in the lives of men who batter. It also fails to explore the role poverty and racism play in the criminal justice processing of domestic violence cases. See, e.g., Raphael, *Feminist Theory of Welfare Dependency*, *supra* note 33, at 226 (arguing for the importance of assisting poor men in efforts to assist poor battered women). See generally Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 LAW & POL'Y 205 (1997).

42. Recognition of interlocking systems of oppression is also important if the battered women's movement is to build alliances with other progressive political work. See generally Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations Among Women*, 1 J. GENDER RACE & JUST. 335 (1998) (arguing that hierarchal systems of oppression are

In this Article, I engage in two simultaneous levels of analysis of Peacemaking: an empirical study of the current practice and the meaning of that practice for battered women in the Navajo Nation, and an examination of the theoretical possibilities of Peacemaking practice both within the Navajo locale and elsewhere.<sup>43</sup> Drawing on the insights of feminist and critical race feminist<sup>44</sup> scholarship, I argue that Peacemaking's process may provide benefits for some battered women that are largely unavailable in formal adjudication.<sup>45</sup> First, Peacemaking has the potential to disrupt social and familial

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interlocking and mutually supporting). Such progressive political work includes economic justice work, Native American rights work, and antiracism work. See, e.g., Margulies, *supra* note 40, at 1078–81 (finding that New Left poverty scholars ignore the relation between women's material resources and gender oppression within families); Meier, *supra* note 41, at 205 (arguing for a synthesizing of the battered women's movement's focus on interpersonal justice with the antipoverty movement's recognition of the larger social causes of poverty). Formal criminal processes are successful for some women, while informal processes work for others. In addition, the two are not mutually exclusive. See *infra* note 411 and accompanying text (noting that domestic violence protection orders are sometimes maintained while Peacemaking takes place).

43. As Carole Goldberg points out, it is dangerous to assume that a practice so dependent on a Navajo world view can be transplanted elsewhere. See generally Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003 (1997). I do not argue that Navajo Peacemaking as practiced can simply be lifted and used in a different locale. While Peacemaking's application to other settings is not the focus of this Article, it may be that some of the benefits of Peacemaking could be realized in other settings. This underscores a central theme of this Article: It is a mistake to assume that universal practices will work in every locale or for every woman. That is not to say that commonalities do not exist or that people from different locales cannot learn from each other. But local advocates must examine their particular political and cultural dynamics, as well as the needs of the women in their community, to determine the interventions that are likely to work best. Chief Justice Robert Yazzie of the Supreme Court of the Navajo Nation as well as James Zion, solicitor general for the Navajo Nation, have argued for Peacemaking's generalizability to other contexts. See, e.g., *An Interview with Philmer Bluehouse*, *supra* note 21, at 169; Yazzie, *Hozho Nahasdlüi*, *supra* note 21, at 124; Yazzie, *Life Comes from It*, *supra* note 21, at 178–79; Zion & Zion, *supra* note 21, at 425–26. Others have argued that community group conferencing, similar in some respects to Peacemaking, is an appropriate process for domestic violence cases. See generally Braithwaite & Daly, *supra* note 1.

44. While critical race feminist theory might be described as an example of feminist theory or as an example of critical race theory, I think it important to distinguish it from the two. Critical race feminist analysis "emphasize[s] conscious considerations of the intersection of race, class, and gender by placing them at the center of analysis." ADRIEN KATHERINE WING, *CRITICAL RACE FEMINISM: A READER* 4 (1997). This approach is a correction to the way in which the concerns of women of color are sometimes overlooked in critical race theory analysis and are equally missing in some feminist discourse. See *id.* at 3.

45. This is not an argument against the use of formal adjudication or against the use of criminal procedures. Indeed, some peacemakers rely on the availability of such mechanisms to encourage offender cooperation. See *infra* note 504 and accompanying text. Formal adjudication is an important resource for some battered women. See, e.g., JoAnn L. Miller & Amy C. Krull, *Controlling Domestic Violence: Victim Resources and Police Intervention*, in *OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE* 235, 244, 251 (Glenda Kaufman Kantor & Jana L. Jasinski eds., 1997) (explaining that in a study of the effects of women's resources on domestic violence recidivism after police intervention, the majority of women reported that police intervention made them feel safer and made the batterer fear future consequences of his violence).

supports for battering by addressing both systemic and personal-responsibility aspects of battering.<sup>46</sup> Second, the use of Peacemaking may benefit some battered women through the use of traditional Navajo stories. Navajo stories with gender antisubordination themes may change the way in which the batterer and his family understand battering,<sup>47</sup> and they thus have the potential to restructure familial relationships that support battering.<sup>48</sup> Third, unlike the normative practices of many legal institutions that routinely process domestic violence cases, Peacemaking may avoid the cultural and legal focus on the necessity of a woman's commitment to separating from her abuser<sup>49</sup> and the tendency towards gender essentialism in legal strategies to end domestic violence.<sup>50</sup>

In Part II, using data from Peacemaking files as well as interviews with peacemakers, family court judges, and Navajo Nation anti-domestic violence advocates, I examine Peacemaking in light of criticisms that are often directed at methods of informal adjudication.<sup>51</sup> I group the problems battered women face in informal adjudication into four types: the coercion problem, the cheap-justice problem, the normative problem, and the communitarian/social-change problem. The coercion problem refers both to forced participation in informal adjudicatory processes (e.g., mandatory mediation) and to coercive tactics used within processes. The cheap-justice problem refers to the tendency in informal adjudication, particularly in restorative justice processes such as victim-offender mediation and family

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46. See *infra* Part I.C.1.

47. See *infra* Part I.C.2.

48. Peacemaking may have other potential benefits that I do not fully address, including its spiritual nature. The Peacemaking process begins with a prayer that invokes divine assistance and imbues the process with a seriousness and sacredness that may encourage honest and sincere behavior by its participants. See *An Interview with Philmer Bluehouse*, *supra* note 21, at 165; Interview with Raymond Austin, *supra* note 14 (explaining that prayer is used in Peacemaking because prayer helps to purify one's mind so that one can focus on the problems at hand). I do not suggest that spiritual concerns are limited to the Native American context. See Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 40-43 (1997) (describing the traditionally important aspect of spirituality in African American communities and its relevance in community involvement in crime control and reintegration of the offender).

49. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 61-63 (1991); see also Mahoney, *supra* note 37, at 73-81.

50. See, e.g., Crenshaw, *supra* note 39, at 1257, 1260; Harris, *supra* note 39, at 585-86; Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 88-96 (1995) (criticizing feminist criticisms of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), for their failure to recognize the importance of tribal sovereignty to Indian women).

51. By "informal adjudication" I refer collectively to practices for resolution of grievances other than Anglo-styled courtroom practices, including mediation that originates in civil disputes as well as restorative justice processes in criminal cases.

group conferencing, to overemphasize the value of offender apology.<sup>52</sup> The normative problem, most often described in critiques of mediation, refers to the interplay of two processes: the presence of unspoken informal rules that shape participant behavior and the ideology of mediator and norm neutrality.<sup>53</sup> These two phenomena separately and in combination implicitly normalize (or “domesticate”<sup>54</sup>) battering behaviors. While many scholars have discussed the problems with coercion, cheap justice, and norms, the communitarian/social-change problem is seldom addressed in critiques of informal adjudication.<sup>55</sup> I refer here to the difficulty of connecting individual acts of oppression (i.e., battering) with the community’s responsibility both for maintaining battering behavior and for fashioning remedies for the victim.

I conclude that the current practice in Navajo Peacemaking provides partial answers to the cheap-justice and normative problems and is somewhat successful in addressing the social-change problem. Current Navajo Peacemaking practice presents significant coercion problems for some battered women, however, and this is particularly true in self-referred cases.<sup>56</sup> These coercion problems may be ameliorated by some procedural remedies that I propose.<sup>57</sup> Finally, drawing on Eric Yamamoto’s model for intergroup race apologies as well as Peacemaking theory, I suggest the shape of an ideal

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52. See *infra* Part II.B.

53. See *infra* Part II.C. Both separately and in combination these two phenomena implicitly normalize battering behaviors. The informal rules that stress future orientation, compromise, and problem solving tend to punish battered women who insist that recognition of battering is relevant to both the process of mediation and the substantive agreements reached. The ideology of mediator- and norm-neutrality forecloses the possibility that the mediator will overtly label battering as bad behavior or insist on its moral relevancy to the issues at hand.

54. See Sara Cobb, *The Domestication of Violence in Mediation*, 31 *LAW & SOC’Y REV.* 397 (1997).

55. Thus, Peacemaking may suggest a process that, as Elizabeth Schneider argues, is needed in feminist theory: simultaneously appreciating both the particular situation of battered women and the “general, linking violence against women to women’s subordination within society and to more general social problems of abuse of power and control.” Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 *N.Y.U. L. REV.* 520, 527 (1992).

Restorative justice literature emphasizes the importance of community involvement in the criminal process but seldom identifies the nature of that involvement or the role of community in crime creation and maintenance. Cf. Paul McCold, *Restorative Justice and the Role of Community*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES*, *supra* note 1, at 85, 89 (arguing that the restorative justice emphasis on individual offenders and victims “may divert attention from the root causes that continuously produce [crime]”).

56. See *infra* notes 377–406 and accompanying text. Self-referred cases are those that are initiated directly by a petitioner rather than referred by court. See PEACEMAKER CT. R. 3.1, 3.2, in JAMES W. ZION & NELSON J. MCCABE, *NAVAJO PEACEMAKER COURT MANUAL* 104–05 (1982) (providing that any person who has been “injured, hurt or aggrieved by the actions of another” may request Peacemaking).

57. See *infra* notes 407–411 and accompanying text.



informal adjudication process for domestic violence cases. In an Appendix following the Conclusion, I address two limitations of this research: imperialism-related concerns and empirical concerns.

## I. DOMESTIC VIOLENCE CASES IN PEACEMAKING

### A. Women, Gender, Conquest, and Domestic Violence in the Navajo Nation

The material, psychological and spiritual circumstances of Navajo people—circumstances that are a direct result of colonization—are related to both the occurrence of domestic violence and women's responses to such violence.<sup>58</sup> Colonization has diminished Navajo women's social and economic status. This diminishment in status combined with material deprivation and the subordination of Navajo cultural and political life creates social conditions that foster domestic violence.

U.S. policy has diminished the status of Navajo women through both direct and indirect means. Direct attacks on women's status include governing policies that privilege male tribal members over female members<sup>59</sup> and federal aid to religious institutions that promote male authority.<sup>60</sup> Indirect attacks on women's status include land management policies that diminish

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58. I do not argue that colonization's effects provide a total explanation for the occurrence of domestic violence. Indeed, the relationship of domestic violence to subordination is very difficult to delineate. Nor am I arguing that the Navajo context is unique vis-à-vis women's status or the experience of violence against women. Navajo women continue to enjoy a much higher social status than do many women in the world, and, as I discuss later, traditional Navajo culture is largely based on notions of gender egalitarianism and is matrifocal. This is not an argument that Indian people or Navajos, in particular, are peculiarly vulnerable to the existence of domestic violence. In fact, domestic violence appears to be widespread throughout the world. See *infra* note 184. For a more thorough discussion of Navajo gender relations, see generally EMILY BENEDEK, *BEYOND THE FOUR CORNERS OF THE WORLD: A NAVAJO WOMAN'S JOURNEY* (1996), LOUISE LAMPHERE, *TO RUN AFTER THEM: CULTURAL AND SOCIAL BASES OF COOPERATION IN A NAVAJO COMMUNITY* (1977), Nancy Bonvillain, *Gender Relations in Native North America*, 13 *AM. INDIAN CULTURE RES. J.* 1 (1989), Rose Johnson/Tsosie, *Our Testimonies Will Carry Us Through*, in *SURVIVING IN TWO WORLDS: CONTEMPORARY NATIVE AMERICAN VOICES* 93 (Jay Leibold ed., 1997), and Mary Shepardson, *The Gender Status of Navajo Women*, in *WOMEN AND POWER IN NATIVE NORTH AMERICA* 159 (Laura F. Klein & Lillian A. Ackerman eds., 1995).

59. See *infra* Part I.A (discussing legislation and policies that diminished Navajo women's status).

60. Religiously affiliated boarding schools, for example, received federal funding to "educate" Navajo children. Much of the training in many of these schools related to "appropriate" gender roles. See PATRICIA PENN HILDEN, *WHEN NICKELS WERE INDIANS: AN URBAN, MIXED-BLOOD STORY* 167 (1995) (noting that fully half of the prescribed boarding school curriculums was devoted to teaching appropriate gender roles).

the economic importance of women's work,<sup>61</sup> education policies that result in the devaluation of clan and kin relationships, and policies that burden or outlaw native religious practices in which women often play significant leadership roles. The result is greater reliance on federal assistance, frequently unavailable or underpaid wage labor, and a disruption in the family and clan relationships that define obligations and often serve to protect women.<sup>62</sup>

Traditional Navajo culture is a "partnership society"<sup>63</sup> in which "complementary [gender] roles arise from the deepest traditional beliefs tribal people hold about how they were created and should function in the universe."<sup>64</sup> The political and social manifestation of this belief in gender complementarity, as evidenced by the relatively important status of women and children, was particularly troubling to early European colonizers, who

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61. For example, U.S. federal land allotment policies required that male heads of households hold title to family lands. See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 301 n.56 (1998).

The term "allotment" refers to the late nineteenth century policy under which reservation land was allotted to individual heads of families, with the excess or "surplus" lands not needed for allotment opened to settlement. In this way, the policy was designed both to encourage tribal people to assimilate by breaking their attachment to communal land ownership and turning them into farmers and ranchers and by making tribal land available for settlement by non-Indians. Although this policy was repudiated in the Indian Reorganization Act, over 27 million acres of tribal land was lost to tribal or Indian ownership. As a result, the majority of residents of some reservations are non-Indians.

*Id.* See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (tracing the history of allotment).

62. See, e.g., Zion & Zion, *supra* note 21, at 411-13 (explaining that clan relationships and a matrilineal tradition of living ensured a balance of power between men and women who lived together).

63. See Shepardson, *supra* note 58, at 174; see also Bonvillain, *supra* note 58, at 9 ("[Among the Navajo,] [g]ender equality in labor, prestige and social valuation was consistent with mutual interdependence and fluidity in roles. Intra-familial violence was minimal. Women were protected by the presence of their kin within the settlement."); Zion & Zion, *supra* note 21, at 412 (explaining how traditional Navajo matrilineal living arrangements, "women's property ownership and control, [and] the mother's determinative role in tracing ancestry" are evidence of gender equality in traditional Navajo culture).

64. Valencia-Weber & Zuni, *supra* note 50, at 93; see also CLYDE KLUCKHOHN & DOROTHEA LEIGHTON, *THE NAVAHO* 311 (rev. ed. 1974) ("[E]verything exists in two parts, the male and the female, which belong together and complete each other."); An Interview with Philmer Bluehouse, *supra* note 21, at 162 ("We believe that there is a male and a female existence in everything, that within protons, neutrons, electrons or even within emptiness, those dual beings exist."). While some would describe male-female complementarity as the central paradigm for Navajo *hózhó*, other scholars would place the mother-child relationship in this role. See Shepardson, *supra* note 58, at 173 ("The *k'e* that exists between mother and child provides the foundational concepts and forms for all relationships in Navajo social life." (quoting GARY WITHERSPOON, *NAVAJO KINSHIP AND MARRIAGE* 125-26 (1975))).

frequently set out to instill male-female and parent-child hierarchies.<sup>65</sup> The emphasis on male authority remained central to U.S. policy. While the process of colonization and the concomitant disempowerment of Navajo women is ongoing, three events in the history of U.S.-Navajo relations bear particular attention: the capture, forced march, and internment of Navajo people in Fort Sumner in 1864; the imposed livestock reduction of the 1930s; and the mandatory schooling of Navajo children in boarding schools. These three events serve as cultural markers for many Navajo—moments in which their injuries are concrete and quantifiable.<sup>66</sup> Each marks a significant downward shift in the status of Navajo women. Together these events and their aftermath illustrate the effects of U.S. colonization and the subsequent material and spiritual harms to Navajo people.

“During the spring of 1864, more than 7,000<sup>67</sup> Navajo men, women, and children were driven like cattle across the . . . plains of New Mexico to Fort Sumner, where . . . [they were] prisoners for four long years—four years

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65. See PAULA GUNN ALLEN, *THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS* 32 (1986) (explaining that contemporary sources complained of the “petticoat” government of the Cherokee, in which the Women’s Council was powerful and the penalty for killing a woman was double that of killing a man). Jesuit missionary Friar Paul Le Jeune described the changes necessary to make the Montagnais-Naskapi proper French subjects: The men must gain authority over their women, parents must use physical punishment with their children, and the (male) leaders of the tribe must command obedience and respect out of fear. See *id.* at 38–40. For the Navajo, this included the criminalization of plural marriages, which were designed to protect women. See Zion & Zion, *supra* note 21, at 411 (explaining that plural marriages occurred when it was not feasible to enact the usual matrilocal living arrangements, and that if the man married his wife’s sisters or his widowed mother-in-law, it ensured that his wife’s family would be cared for and that his wife would not be outnumbered in her husband’s house).

66. See, e.g., Conversation with Justice Raymond Austin, in Canyon de Chelley, Ariz. (Summer 1995) (describing Kit Carson’s pursuit of Navajo hiding in Canyon de Chelley); Interview with Peggy Bird & Jennifer Skeet, *supra* note 17 (describing the harm created by generations of boarding school parents); Interview with Gloria Champion, *supra* note 17; Interview with Leo Natani, *supra* note 12 (discussing his family’s stories regarding incarceration in Fort Sumner and the devastation of alcoholism). The importance of federal policies on livestock reduction was made apparent in the number of Peacemaking files involving family disputes over limited grazing permits. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

67. There may be some disagreement about the number. Compare Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 23, 34 (M. Annette Jaimes ed., 1992) (noting that 9000 Navajo surrendered and were force-marched more than 300 miles to a site near Fort Sumner), with MARIE MITCHELL, *THE NAVAJO PEACE TREATY, 1868*, at 78 (1973) (noting that 7000 Navajo were forced to march to Fort Sumner). The differences are explained in part by the fact that, once begun, the march was joined by many Navajo who were forced to surrender or face starvation. See *id.* at 74–76; see also DAVID F. ABERLE, *THE PEYOTE RELIGION AMONG THE NAVAHO* 25 (2d ed. 1982) (stating that by 1864, 8000 Navajo had made the trek to Fort Sumner).

of hardships, disease, and near starvation . . . .<sup>68</sup> The conditions inside Fort Sumner were brutal.<sup>69</sup> It was winter and the fort had no shelters for the Navajo and very little food.<sup>70</sup> As a result, as many as 3500 Navajo died in the fort.<sup>71</sup> The Peace Treaty of 1868<sup>72</sup> allowed the Navajo to return home, but to a land whose size had been seriously diminished.<sup>73</sup> The treaty also provided a limited franchise to Navajo men, but not to women.<sup>74</sup> After the return from Fort Sumner, tribal economic and political life were largely controlled by the United States. The imposed Anglo judicial and tribal council systems

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68. MITCHELL, *supra* note 67, at 74. This incarceration followed Kit Carson's campaign to locate and force the surrender of those Navajo in hiding. See ABERLE, *supra* note 67, at 25. Carson was acting under the direction of General Stephen W. Kearney. See MITCHELL, *supra* note 67, at 74. Many people hid in the canyons and caves of Canyon de Chelly, Arizona. The canyon offered a great deal of protection because there was only one narrow path that led to its narrow floor. In this way, the Navajo had successfully repulsed soldiers in the past. In an effort to starve the Navajo out of hiding, Carson ordered the soldiers to burn their crops, chop down their fruit trees, and slaughter their livestock. Many Navajo decided to surrender rather than starve, only to find that conditions in the site of removal, Fort Sumner, were not appreciably better. See *id.* at 78–89.

The Navajo had been involved in warfare against the Spanish colonists for over 200 years at the time of the Treaty of Guadalupe-Hidalgo in 1848. There was no pan-Navajo leadership, and groups of Navajo gained additional livestock by raiding wealthy Mexican landowners. Mexican landowners also raided Navajo communities, and Navajo raids sometimes centered on freeing Navajo who had been sold as slaves in the market in Santa Fe, New Mexico. Following the Treaty of Guadalupe-Hidalgo, the U.S. government began to attempt to control Navajo raiding. While this provided the excuse for Navajo removal, the more important reason probably lies in the discovery of rich mineral deposits in Navajo land. See MITCHELL, *supra* note 67, at 29.

69. See MITCHELL, *supra* note 67, at 78–89.

70. See Stiffarm & Lane, *supra* note 67, at 34. Though representatives of the U.S. government had promised that food, shelter, and farming tools awaited them, this was not the case. The first winter, people were forced to dig holes in the ground and cover themselves with bits of tent and other scraps to protect themselves from the bitter cold. See *id.* It appears that Kit Carson suspected as much. In order to encourage his men's efforts, he at one time offered them the privilege of selling the women and children captured as slaves to wealthy Mexican landholders, a practice initiated by the Spanish and, at that time, in place for over 100 years. Carson reasoned that slavery was a better lot than what awaited the Navajo at Fort Sumner. See MITCHELL, *supra* note 67, at 67.

71. See Stiffarm & Lane, *supra* note 67, at 34. The memory of Fort Sumner is still alive for many Navajo. One peacemaker related how his grandfather reported that starvation inside the fort forced people to look in horse droppings for corn kernels to eat. See Interview with Leo Natani, *supra* note 12.

72. Treaty Between the United States of America and the Navajo Tribe of Indians, Aug. 12, 1866, U.S.–Navajo Nation, 15 Stat. 667.

73. See ABERLE, *supra* note 67, at 25. Aberle writes that “[b]etween 1863 and 1868, [the Navajo] had passed from prosperity and independence to the cramped, hungry, and unhealthy conditions of Fort Sumner, and on to the poverty and freedom of the return to Navaho land.” *Id.*

74. See Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 72, art. X (providing that “[n]o future treaty for the cession of any portion or part of the [Navajo] reservation . . . shall be of any validity . . . unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same”).

“did not support the high position of Navajo women.”<sup>75</sup> Census reports listed men as “heads of household,” despite the Navajo matrilineal system of property<sup>76</sup> and matrilineal system of living arrangements.<sup>77</sup> In the subsequent “allotment period” in which the United States carved up Indian land into individual parcels, most of the allocations went to these male “heads of household.”<sup>78</sup> As Jo Carillo writes, the result was not merely a change in tribal landholding patterns.

Relying as it did on the “family head” provision to distribute land parcels, the allotment legislation allowed the United States to insinuate itself into the tribal social fabric by systematically privileging tribal males over tribal females. This designation further destabilized tribal traditions, particularly female-centered ones, and it gradually allowed the pluralistic and gender-inclusive ways that many Native American peoples had used in their processes of self-government to slip from practice, if not memory.<sup>79</sup>

The confinement to a limited land mass coupled with the Navajo economic reliance on sheep herding<sup>80</sup> set the stage for “the most devastating

75. Shephardson, *supra* note 58, at 174 (“After the Treaty of 1868, the new federal authority did not support the high position of Navajo women.”). Aberle notes that “[t]he picture that emerges from agents’ reports is one of the gradual replacement of traditional leaders by police, courts, and the agent himself.” ABERLE, *supra* note 67, at 34. Rather than a system of indirect rule, the “[U.S. government] agent became the super-ordinate political figure.” *Id.* In 1923, the United States imposed a tribal council system. If the people refused to elect members, the Secretary of the Interior simply appointed someone. *See id.* at 42. Navajo women were not given the vote until 1928. *See id.*

76. *See id.* at 161.

Inheritance operates according to matrilineal principles. This means that a man’s relatives in the maternal line—his own siblings, his mother, his mother’s sisters and brothers, and her sisters’ children—take precedence over his wife and his own children . . . . A woman’s children and other relatives in the maternal line take precedence over her spouse.

*Id.*

77. *See* LAMPHERE, *supra* note 58, at 81 (stating that the Navajo expressed a preference that young couples reside with the woman’s family); Shephardson, *supra* note 58, at 174. For example, current family law provisions of the Navajo Nation Code provide less protection for women than was the case under traditional law when property rights passed exclusively through the female line. *See* Genevieve Chato & Christine Conte, *Rights of American Indian Women*, in *WESTERN WOMEN: THEIR LAND, THEIR LIVES* 229, 234 (Lillian Schlissel et al. eds., 1988). The authors describe a case in which a woman requested in divorce proceedings a one-half interest in a hogan built on her husband’s family’s land. Traditional law would have accorded her 100% of the value of the property, but the trial judge refused her even half. The judge’s ruling was overturned on appeal, and the woman was awarded half the value of the hogan. *See id.* at 235–36.

78. *See* Shephardson, *supra* note 58, at 174.

79. Jo Carillo, *Tribal Governance/Gender*, in *READINGS IN AMERICAN INDIAN LAW* 205, 206 (Jo Carillo ed., 1998).

80. *See* ABERLE, *supra* note 67, at 31–32 (describing various accounts of per capita sheep ownership, all of which are considerable). Aberle notes that had the Navajo remained restricted to the Treaty of 1868’s land provisions, the result would have been serious deprivation. *See id.* at

experience in [Navaho] history since the imprisonment at Fort Sumner”;<sup>81</sup> the forced reduction of Navajo livestock and the grazing permit structure that followed. In the 1930s, in response to concerns about overgrazing, the U.S. government began a program of forced stock reduction.<sup>82</sup> Federal agents slaughtered sheep and goats and burned the carcasses.<sup>83</sup> The reduction in sheep herd size and the effects of the Great Depression on Navajo ability to sell livestock made wage labor, frequently off-reservation, increasingly necessary.<sup>84</sup> These jobs were more readily available for men.<sup>85</sup> The federal government promised jobs in return for Navajo compliance with stock reduction, but these jobs did not necessarily go to those who had lost stock,<sup>86</sup> and, though many women were stock owners, all of the federal jobs were for men.<sup>87</sup> In addition, grazing permits were often based on livestock registrations that were completed at sheep dipping. While many women owned sheep, male members of their families often brought the sheep to be dipped; as a result, female-owned sheep were frequently registered under the names of male family members.<sup>88</sup> Thus, the economic importance of female labor diminished because of the strict limitations on sheep ownership coupled

28. However, the Navajo have been reasonably successful in adding land over time. *See id.* at 27–28. The major setback to land accumulation occurred as a result of the General Allotment Act (Dawes Act) of 1887 and federal allocation policies, which allotted reservation lands to individual heads of families, restricted their sale, and granted “surplus” lands to white settlers. The result is a “checkerboard” jurisdiction where Indian land is sometimes surrounded by non-Indian land. *See id.* at 28; *see also* General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388, 388–91 (1887); Newton, *supra* note 61, at 301 n.56.

81. ABERLE, *supra* note 67, at 53 (alteration in original) (quoting Sam Ahkeah, Chairman of the Navajo Tribal Council from 1946 to 1954). While Aberle spells the tribal name “Navaho,” the Navajo Nation Council has declared the Nation’s official name to be “Navajo.” *See* NATION CODE tit. 1 § 301 (Equity 1995). Therefore, I use “Navajo” throughout this Article.

82. For a thorough description of the stages of stock reduction policies, *see* ABERLE, *supra* note 67, at 52–108.

83. *See, e.g., id.* at 57. “To the Navahos this waste was appalling, and the attitude toward their valued resources was incomprehensible.” *Id.* Aberle paraphrases a Navajo writer to Congress, complaining of the stock reduction policy, who asked the senators how they would feel if someone asked them for a five-dollar bill and then burned it in front of them. *See id.* at 63.

84. There is little doubt that this shift decreased the economic control of women. Scholars may disagree as to whether and how much it served to diminish women’s roles in the political and social sphere. *See generally* Laila Shukry Hamamsy, *The Role of Women in a Changing Navaho Society*, 59 AM. ANTHROPOLOGIST 101 (1957) (describing the loss of status of Navajo women as a result of colonization).

85. *See* Chato & Conte, *supra* note 77, at 238 (“The New Deal administration attempted to ease the transition from a pastoral economy to one based on wage labor by hiring Navajos as manual laborers for public works projects . . . [but] [m]ost of the jobs were short-term . . . and gave preference to men.”).

86. *See* ABERLE, *supra* note 67, at 56.

87. *See* Shepardson, *supra* note 58, at 174.

88. *See* ABERLE, *supra* note 67, at 66.

with the lack of female access to wage labor.<sup>89</sup> Further, female ownership of sheep was undercounted and thus not always recognized in the allocation of the grazing permits necessary for sustaining sheep herds.

The third experience described by many Navajo as central to understanding the current Navajo context is "the boarding school experience."<sup>90</sup> From the late 1870s until the early 1900s, the U.S. federal government removed Indian children, often forcibly, from their parents and sent them hundreds of miles away to boarding schools.<sup>91</sup> Children were often not allowed to speak their native language, wear native dress, or engage in native religious practices.<sup>92</sup> As evident in the following description given by a Navajo man, the original ideology of "[k]ill the Indian and save the man"<sup>93</sup> remained true for many generations of boarding schools.

[My brothers] were gone nine months of the year, hundreds of miles to the west, at distances I could not ever have fathomed as a child. They had no choice. The whole intent was to destroy who and what they were. *Dine'*. It was a new form of warfare. . . . They had only each other. They said they never cried, not even when things got so bad some kids escaped. Stories abounded about what happened to some of those runaways. Frostbite, rape, gangrene, exposure deaths.<sup>94</sup>

The atmosphere was often one of repression, fear, loneliness, and the constant fear of physical reprisal. Many children were sexually and physically

89. See Chato & Conte, *supra* note 77, at 238 ("Today livestock raising and farming, the traditional bases of Navajo women's authority in the household, account for only an estimated four percent of the Navajo income.").

90. See Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author) ("There is so much violence [in families]; there are deep wounds and there has been no healing done. There is a whole generation of boarding schools where the parents did not learn any parenting skills at all and then the wounds that are intergenerational.").

91. See generally Jorge Noriega, *American Indian Education in the United States: Indoctrination for Subordination to Colonialism*, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE, *supra* note 67, at 371.

92. See EDUARDO DURAN & BONNIE DURAN, NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY 28 (1995).

The destruction of Native American families was, in part, carried out through the coerced attendance of Native American children at boarding schools designed to forcefully remove Native American culture. The child had to live away from the parents for the duration of the school year and was not allowed to speak the native language or engage in any activities that were remotely connected to the child's culture. The child was often forced to practice Christianity and was taught that any religious belief that s/he had from his own tribal belief system was of the devil . . . .

*Id.* at 27-28.

93. See HILDEN, *supra* note 60, at 152 (quoting General Richard Henry Pratt, founder of the first and largest such boarding school).

94. IRVIN MORRIS, FROM THE GLITTERING WORLD: A NAVAJO STORY 82-83 (1997). "Dine'" is the Navajo word for the Navajo people. See Yazzie, *Hozho Nahasdlii*, *supra* note 21, at 120.

abused.<sup>95</sup> As bitter as all of this was, the most damaging aspect of the boarding school experience might well have been the deprivation of family and clan life.<sup>96</sup> Removal meant that children were deprived of the education they would otherwise have received—an education that was related to clan relationships and geographic place.<sup>97</sup> Children became strangers to their

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95. Indian children in boarding schools often were the victims of physical and sexual abuse, not to mention the routine psychic abuse from rules against practicing their native religion or speaking in their native language. See ROMA BALZER ET AL., *FULL CIRCLE: COMING BACK TO WHERE WE BEGAN* 80–81 (1994). *Full Circle* is a training manual for domestic violence work with Native women published by Mending the Sacred Hoop/Minnesota Program Development, Inc. In it, one woman recalled:

My grandmother told me that when she was 12 years old (in 1901), she walked away from the boarding school to see her parents who lived in town. The nuns viewed this as an escape and when she was recovered from her parents she was tied to a tree in front of the boarding school and left there. She couldn't remember for how long.

*Id.* at 81. Another man recounted the following:

You know, I was put in one of those schools. When I was eight, I was raped by the priest. We all were. All of us boys. It was part of being there in that orphanage, that boarding school. All my uncles and dad too had that happen. I just thought it was normal. It happened to everyone in my family. All the men. I don't know about the women. Do you think it could have happened to them too[?]? I know a lot of Indian guys that happened to in all those schools.

*Id.*

96. The early focus of U.S. Indian education policy was clearly pacification. See Noriega, *supra* note 91, at 381.

Already functional outcasts within their own societies, the circumstances of boarding school returnees were typically exacerbated by local Indian agents who sought them out for preferential treatment in exchange for their participation in the building of “alternative” social and governmental structures intended to undermine and eventually replace the traditional forms possessed by their peoples.

*Id.* at 383. Federal authorities were anxious to develop a contingent of white-educated Indians who would be more amenable to federal control.

97. In Navajo religious thinking, geography holds deep significance, with locales representing particular aspects of traditional stories that describe the creation of the five-fingered (earth) people. See *id.* at 381. As one Ojibwe woman relates her own boarding school experience:

All my life I've searched for something and never knew what it was until I heard someone mention “boarding school” in a public meeting at the Indian Center. Everyone got mad at this guy and ran him out of there. I just sat there, remembering. I felt choked up as I thought of his words, “All these troubles we have as Indian people started when we were sent to those boarding schools.” As I recalled us kids being taken away, I thought of my baby brother who was still in diapers at the time. We never had a family life after that and eventually we got separated from each other. As adults we found each other, but we were never able to be close again, there were too many memories that kept us apart. We could never talk about it. There was an indescribable emptiness that seemed to stop us from talking. Now, I'm an old woman dying from cancer but I'm happy. I know now that I need to talk about this. I need to talk with other Indian people about their experiences in boarding school. I've finally found what I've been searching for, a part of me that's been lost. I can only get that back by talking to other Indian people. No one can take my culture away from me now. I'll get back everything I've lost and more before I die. I'll never get my family back and that's something I've had to accept, but I will never forget.

BALZER ET AL., *supra* note 95, at 80–81.



parents and grandparents, their only contact occurring during vacations or not at all.<sup>98</sup> Though the practice of forcible removal to boarding schools stopped in the 1920s, Indian children continued to attend boarding schools in significant numbers through the 1960s and 1970s.<sup>99</sup> Thus, many Navajo men and women now in their forties and fifties were raised primarily by persons who were hostile and anti-Indian.<sup>100</sup>

Navajo parents who grew up in boarding schools were often subjected to cruel models for raising children. These models were not only abusive but were abusive in ways that were intentionally destructive of Indian identity and self-esteem. As explained by the director of a program for Navajo men who batter:

[We teach battering men the difference between] [d]iscipline [and] punishment [of children.] A lot of times . . . we just never really made

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98. See *id.* at 81–82.

99. See Noriega, *supra* note 91, at 385. The first Indian boarding school opened in 1879 in Carlisle, Pennsylvania. The camp was headed by Captain Richard H. Pratt. Pratt ran the school like a military institution, forcing students to perform the physical labor required to maintain the school, enforcing reveille and lights out, and requiring military dress and hairstyles. See *id.* at 381. Family visits were severely restricted, and students were not allowed to return home, even in the summer, but rather were required to do “vacation work.” See *id.* By 1889, 10,500 Indian children were in boarding schools. See *id.* at 382. By 1901, the numbers had shrunk despite legislation mandating student attendance. See *id.* at 383. By 1917, Congress, reluctant to allocate the money required to assure full compliance with mandatory boarding schools, shifted policies and began to support day schools. See *id.* at 384. Despite this shift in policy, many boarding schools remained open and attendance actually increased from the 1950s to the 1960s. See *id.* at 385. Of 52,000 Indian children in school in 1973, more than 35,000 were in boarding schools. See *id.* The 1970s saw another round of boarding school closures, decreasing the number of enrolled students. See *id.* at 386.

100. See Interview with Raymond Austin, *supra* note 14 (describing his own lack of awareness of Navajo culture as a result of his educational experience); Interview with Leo Natani, *supra* note 12 (describing his own boarding school experiences); Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17 (describing the intergenerational harms of abusive boarding school experiences). The boarding school experience is only one of various campaigns, continuing long after the Navajo were allowed to return from Fort Sumner, to eradicate the “Indian” in the Indian. See generally VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO (2d ed. 1988); THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE, *supra* note 67. Chief Justice Yazzie writes of his own experience:

I am a product of a Bureau of Indian Affairs (BIA) boarding school education which was so destructive of the Navajo culture. When I got out of boarding school, I was given a ticket to California to learn a manual skill in an electronics school. They told me I could not go to college, so I went to college. . . . I went to law school. When I got my law degree, I put it to use as a trial judge in the Courts of the Navajo Nation. That returned me to another school—the school of Navajo life. Now, I seek to reconcile my paper knowledge with the vast knowledge that is held by my Elders . . . .

Yazzie, *Life Comes from It*, *supra* note 21, at 189–90 (footnote omitted).

a distinction. And a lot of us [are] coming from boarding school: our parents and us and all of our children . . . You know, the belts, the paddles, the standing in the corner, [the] punishment[s], . . . [the] reading the Bible. They know all these things. That was all built in, very military kinds of control that they had . . . in the name of Christianity, . . . that really became [a] very overt means to control, and . . . people still really deal with some of those issues.<sup>101</sup>

I spoke with many Navajo who believe that the effects of the boarding school experience live on in the parenting practices of adult survivors.<sup>102</sup> They believe that the current younger generation is particularly confused because older generations were alienated from tribal life by boarding school experiences and were thus unable to teach Navajo history and culture to their children.<sup>103</sup> This effect is compounded by the number of parents who were taught abusive patterns for family and intimate relationships. The result is “a whole generation of [people growing up in] boarding schools where

101. Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17 (discussing their program’s work with men who batter).

102. See *id.*; see also Interview with Peggy Bird and Jennifer Skeet, *supra* note 17; Interview with Gloria Champion, *supra* note 17.

103. See, e.g., Zion & Zion, *supra* note 21, at 421.

[D]iscrimination forced alienated children to return [from boarding schools] to a society that was then foreign to them. Estranged from their own family and culture, a lost generation of people were caught in the middle (i.e., in the middle of American and Navajo values) and turned to alcohol and learned violence. The cycle of institutionalized violence . . . continues in new generations of children who do not know their tribe’s language, culture, and religion because their parents have lost it.

*Id.* Many people spoke with me regarding their deep concerns for Navajo youth. As one family court judge put it,

[M]any of the young people I see are caught in the middle. They want to be white, but they don’t know what that means. They are Native American, and they don’t know what that means. They don’t have a belief system. They say they are Christian, but when you ask them how recently they practiced their religion they say, “Well, not since I was a kid, but my parents go all the time.” Or they say they are traditional, and you ask how recently they participated in traditional activities, and it is the same thing: “But my parents go all the time.” [I don’t] know how you can live without a value system, and that has to come from a belief system whether it’s Christian or traditional or whatever. . . . [Y]oung people frequently don’t know what it means to be a parent . . . So they sort of do what I call “the traffic signal” which is they just go whichever way the traffic is going. If everybody else sends their kids to church, they do that. If everybody else sends their kids to school, they do that. But they don’t really have a sense about what it means to be a parent . . . Can you educate a 45 year old man? The leaders of the Navajo Nation want to go back to traditional ways, but I don’t know whether we will be able to or not because can you change a whole generation?

Interview with Mae Horseman, *supra* note 13. For a more thorough discussion of cultural changes, see *infra* notes 495–509 and accompanying text.

the parents did not learn any parenting skills at all and . . . the wounds . . . are intergenerational."<sup>104</sup>

Thus, the combination of several factors undermined the political and economic status of Navajo women: the move to a wage economy,<sup>105</sup> the disruption and overt intervention in Navajo legal practices that protected women in their relationships with husbands,<sup>106</sup> and the imposition and influence of European patriarchal cultures.<sup>107</sup> The effects of colonization, including internalized racism, boarding school childhood abuse driven by a particularly virulent racist ideology, the use of alcohol as "wages" and the development of alcoholism as a major health issue,<sup>108</sup> and unemployment, are "wounds to the soul"<sup>109</sup> that may intersect Anglo-European notions of gender dominance in the lives of some Indian men<sup>110</sup> and endanger the

104. See Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author); see also DURAN & DURAN, *supra* note 92, at 27.

Beginning in the late 1800s, the U.S. government implemented policies whose effect was the systematic destruction of the Native American family system under the guise of educating Native Americans . . . while at the same time inflicting a wound to the soul of Native American people that is felt in agonizing proportions to this day.

*Id.*

105. See Bonvillain, *supra* note 58, at 10; Zion & Zion, *supra* note 21, at 418–20 (describing how the increase in a wage economy promotes domestic violence because it creates nuclear households in locations where the husband has a job, thus disrupting the matrifocal living arrangements that protect women). In addition, wage labor creates "family conflicts over how wages will be spent, a situation that promotes drunkenness, wife-beating, infidelity, and jealousy." *Id.*

106. See Zion & Zion, *supra* note 21, at 418–20.

107. See ALLEN, *supra* note 65, at 38–39.

108. See M. Annette Jaimies with Theresa Halsey, *American Indian Women at the Center of Indigenous Resistance in Contemporary North America*, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE, *supra* note 67, at 311, 325 (writing that "the despair experienced by American Indians of both genders has manifested itself in the most pronounced incidence of alcoholism of any ethnic group in the United States").

109. See DURAN & DURAN, *supra* note 92, at 24 ("The image which became most binding and meaningful to the authors and to some of the other people working in other Native American communities is the concept termed the *soul wound*.").

110. See Barbara Chester et al., *Grandmother Dishonored: Violence Against Women by Male Partners in American Indian Communities*, 9 VIOLENCE & VICTIMS 249 (1994). Chester and her coauthors note that in addition to alcohol, an increase in domestic violence is related to the removal of Indian people from their ancestral lands, [the] prohibition against religious and spiritual practices, forced removal of Indian children into foster homes and boarding schools at a rate of 5–20 times the national average, rapid transition from hunting, gathering, and subsistence farming to a cash-based economy, and a 90% reduction of the American Indian population from the time of European contact to the establishment of reservations.

*Id.* at 254. While my focus here is on Native men, it is important to note that a recent Bureau of Justice Statistics report finds that 75% of intimate assaults reported to researchers were committed by a non-Indian. See LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 8 (1999).

women and children closest to them. Not surprisingly, many of the Navajo battered women's advocates I spoke with discuss domestic violence in terms that combine insights regarding the effects of ongoing colonization<sup>111</sup> with the more gender-focused understandings of the broader U.S. battered women's movement.<sup>112</sup>

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111. See, e.g., Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17 (describing the importance in work with Indian batterers of developing a positive Indian masculine identity through the use of traditional concepts). Another battered women's advocate I spoke with explained that alcoholism is so prevalent that some families believe that the most important criteria for a good husband are that he not drink and that he be employed. Thus, if these things are true, family members may dismiss domestic violence as a less important consideration. The advocate's point was that familial experiences matter in determining what kind of support a battered woman will receive from her family members. See Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author); see also BALZER ET AL., *supra* note 95, at 106.

Programs offered to native men who batter their partners are most effective when they directly address their use of violence against others and incorporate an analysis which draws links between pre-colonial and post-colonial attitudes towards women, family, and tribe. The impact of colonization, however, should not be used as an excuse for antisocial behavior but as an illustration of how the influence of changing views of women since colonization contributes to the use of violence against them today. Connections should be made between the individual's use of violence within the domestic setting and the systematic Euro-cultural violence used against native people since first contact with colonials.

*Id.* at 106–07.

112. See, e.g., BALZER ET AL., *supra* note 95. The authors write:

Men's violence against women . . . is not about a couples' [sic] failure to communicate, loss of temper, or poor impulse control. It is not a disease or caused by alcoholism (although drinking may be involved), it is not about low self-esteem, and it is not a demonstration of someone loving too much. Men's use of violence and abuse is about the ability to control and abuse of that ability.

*Id.* at 7. The same manual notes that "few native people coming in contact with the justice system . . . recognize its processes, have contributed to its development, or are involved in its implementation. The vast majority of Native Americans are effectively unable to participate in any informed or influential fashion in the existing justice system." *Id.* at 85. While defining the accountability of intervention programs primarily in terms of their responsiveness to victims, the authors also write that

[t]here is also a place in this intervention [system] to be accountable to the abuser. To be accountable means to create a place and an atmosphere for the abuser who is a product of social conditioning to change, and that requires that the change opportunities available are of excellent quality, are clear, are direct, and are both compassionate and confrontational.

*Id.* at 99.

Mending the Sacred Hoop was formed in 1991 by Indian people from Minnesota, Wisconsin, and South Dakota who wanted "the four reservations in northeastern Minnesota to model for all Indian people a way to confront this violence" and to "help this generation of families so that our children see that these verbal, physical, and sexual attacks are wrong and not the Indian way." *Id.* at 16 (quoting a staff member).

Research and anecdotal evidence suggest that domestic violence is a significant problem for Navajo people.<sup>113</sup> Yet there are very few shelters for battered women and their children.<sup>114</sup> There are few programs that provide

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113. See, e.g., Yazzie, *Navajo Peacekeeping*, *supra* note 21, at 98 (asserting that domestic violence is one of the biggest problems in the Navajo Nation court system). For some, the injuries may be aggravated by general poor health and inadequate medical care. See RONET BACHMAN, *DEATH AND VIOLENCE ON THE RESERVATION: HOMICIDE, FAMILY VIOLENCE, AND SUICIDE IN AMERICAN INDIAN POPULATIONS* 85 (1992). American Indians in general suffer much higher rates of violent victimizations than members of any other racial or ethnic group. See GREENFELD & SMITH, *supra* note 110, at 2. The average rate of violent victimization for American Indians (men and women) is approximately two and one-half times that of the national average. See *id.* at 2. The aggravated assault rate is approximately three times the national average. See *id.* at 3. The nature of the violence, including the percentage committed by intimates or family members, is not significantly different from that of the national average. See *id.* at 8. As is true of the general U.S. population, the majority of victims of violent crime are men. See *id.* at 4. American Indians suffer higher rates of accidental death, often vehicle related, especially among young men. See BACHMAN, *supra*, at 7. Some researchers believe these accidents are better understood as suicides. See *id.* Rural American Indians are victimized at rates two times that of rural whites or blacks, and those who live in urban areas are victimized at rates three times that of urban whites. See GREENFELD & SMITH, *supra* note 110, at 4-5. Forty percent of American Indians live in rural areas, compared with 18% of whites and 8% of blacks. See *id.* at 4.

In sharp contrast to all other racial and ethnic groups, American Indian victims are far more likely to have been victimized by someone of a different race. See *id.* at 8. Some perpetrators, Indian and non-Indian, are in authority positions vis-à-vis their role as agents of the federal government. For example, in 1990 the U.S. House of Representatives noted in the findings that preceded an Indian child protection bill that "multiple incidents of sexual abuse of children on Indian reservations have been perpetrated by person[s] employed or funded by the Federal government." H.R. REP. NO. 101-876, at 1 (1990) (Indian Child Protection and Family Violence Prevention Act, 32 U.S.C. §§ 3201-3211 (1994)). According to a recent Bureau of Justice Statistics report, 75% of American Indians victimized by an intimate and 25% victimized by a family member are attacked by non-Indian perpetrators. See GREENFELD & SMITH, *supra* note 110, at 8. In contrast, generally among all races only 11% of intimate victimizations and 5% of family victimizations are committed by someone of a different race. See *id.* Forty percent of all Indian homicide victims are killed by non-Indians. See *id.* at 22. Some studies indicate a higher homicide rate for American Indians than the national average, but the latest Bureau of Justice Statistics report notes that American Indian homicide rates (per capita) are no higher than those of the general population and that Indian homicide rates are decreasing (as are the general population's). See *id.* at 19. *But see* Scott H. Nelson et al., *An Overview of Mental Health Services for American Indians and Alaska Natives in the 1990s*, 43 HOSP. & COMMUNITY PSYCHIATRY 257, 258 (1992) (reporting that the national rate of suicide, homicide, and "accidental" death among young Native American males is much higher than the national average); Justin Arbuckle et al., *Safe at Home? Domestic Violence and Other Homicides Among Women in New Mexico*, 275 JAMA 1708e, 1708e (1996) (finding that the rate of domestic violence homicide in New Mexico among American Indians (4.9 per 100,000) was significantly higher than that among Hispanics (1.7) and non-Hispanic whites (1.8)).

114. See Telephone Interview #2 with Peggy Bird, former Director of the Native American Family Violence Prevention Project of DNA People's Legal Services and currently faculty/attorney/consultant with Mending the Sacred Hoop (May 1999) (notes on file with author). Funding is clearly one reason for the lack of resources. Funding for social services, much of it federal, has historically focused heavily on alcohol treatment. The result, according to some, is a social service industry that tends to understand domestic violence in alcohol treatment terms. See Telephone Interview with Eileen Hudon, Staff Member of Mending the Sacred Hoop (Mar. 26, 1997) (notes on file with author). Hudon who is Ojibwe, noted that since most of the money for human serv-

legal assistance directed specifically to battered women,<sup>115</sup> and the criminal justice system is seriously understaffed.<sup>116</sup>

In addition, battered women in the Navajo Nation must contend with the problems that face many poor women in rural areas, including lack of transportation and the near impossibility of hiding.<sup>117</sup> Many rural Navajo homes do not have telephones. One battered women's counselor described the experience of a woman who only had access to a phone several miles away at a chapter house.<sup>118</sup> She had to flee her husband, walk to the chapter house,

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ices from federal and tribal governments is for chemical dependency programs, the medical model of "healing" (prevalent in the chemical dependency field) is often applied to domestic violence. See *id.* Hudon notes that "We're just beginning concerted efforts [on domestic violence]. The challenge is to link the conversations [regarding chemical dependency] to a well-developed [model] and analysis of domestic violence." *Id.* Many people I interviewed believed that alcohol was a contributing factor in domestic violence rates. See Interview with Ruthie Alexis, *supra* note 12; Interview with Crownpoint Peacemakers, *supra* note 9; Interview with Leo Natani, *supra* note 12; see also Interview with Raymond Austin, *supra* note 14; Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17. See generally *infra* note 249 regarding the research on alcohol use and battering. Crime victim surveys of American Indians report that the perpetrator was under the influence of drugs or alcohol at the time of the victimization in 55% of the cases, and in family violence cases, the number of drinking perpetrators reaches 75%. See GREENFELD & SMITH, *supra* note 110, at 9–10. However, the majority of these perpetrators were non-Indians. See *id.*

115. The DNA People's Legal Services program assists battered women in filing protection order petitions and in family law matters, as do a handful of other programs. See Telephone Interview #1 with Peggy Bird, former Director of the Native American Family Violence Prevention Project of DNA People's Legal Services and currently faculty/attorney/consultant with Mending the Sacred Hoop (March 1997) (notes on file with author). Federal monies available as a result of the Violence Against Women Act (VAWA), 42 U.S.C. §§ 13931–14040, are now being used in the Navajo Nation to develop a more coordinated community response and to encourage a stronger criminal justice intervention. See Telephone Interview #1 with Peggy Bird, *supra*.

116. See Yazzie & Zion, *supra* note 2, at 165 ("There are not enough police to patrol a rural nation that is larger than nine states."). Peggy Bird believes that many abusive men scoff at the criminal law. Bird notes that batterers are aware there is little jail space available in the Navajo Nation. See Telephone Interview #1 with Peggy Bird, *supra* note 115. The Bureau of Justice Statistics reports that in 1998 the Navajo Nation had jail space for 249 adults and 50 juveniles. See GREENFELD & SMITH, *supra* note 110, at 32–33 tbl.37. A staff of 117 operates the facilities. See *id.* The Navajo Nation has a population of more than 220,000 people and covers 25,000 square miles. See Yazzie, *Hozho Nahasdlüi*, *supra* note 21, at 118 n.13. Incentives to "undercharge" in domestic violence cases may be especially strong because Navajo jails are seriously overcrowded and Navajo courts do not have jurisdiction over felony charges. See Indian Civil Rights Act, 25 U.S.C. § 1302(7) (providing that tribes can only impose a sentence of up to one year and/or a \$5000 fine for any one offense). There are good reasons to mistrust the fairness of federal courts in the treatment of Indian defendants. See *infra* note 562 (discussing incarceration rates of Native men).

117. See, e.g., Kathryn Fahnestock, *Not in My County: Excerpts from a Report on Rural Courts and Victims of Domestic Violence*, JUDGES' J., Summer 1992, at 10, 11–14 (asserting that rural battered women face problems such as lack of anonymity, isolation, traditional attitudes about gender roles and the shame of seeking help, poverty, bias of court personnel, and inadequate resources, and noting that extended court hours are important because many rural women must arrange transportation, child care, and safety plans before going to court).

118. See Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17. The chapter house is the building where local government counsels meet.

call the program's emergency number, and wait—alone, at night—for someone from the program to pick her up.<sup>119</sup> Another advocate related the following story about a woman who lived in an isolated area with her husband and their three children and whose only neighbors were his relatives.

[She] had to haul all the wood, carry the water, do all of this back-breaking labor. Her husband would disappear for days and then he would come home drunk and he would force her to have sex and he would beat her. He might leave groceries, but then he leaves again. He would let the air out of the tires so she couldn't leave. She tried to leave him and he would follow her and bring her back.

So she sat down with him at one point and said, "I just want this to be over and I want a divorce." She didn't even get the words out of her mouth, he beat her so bad that time that he almost killed her. He kept her in the house for two days and he didn't take her to see a doctor. . . . After a couple of days he drove the whole family over to some of his family . . . and they convinced him that he needed to take her to the hospital, but he took her far away to a hospital where [they were] less likely to be recognized. He explained to the doctors that she had fallen off a horse and had been kicked by the horse. Of course she couldn't say anything different because he was there and he had the kids. . . .

[Her family found out about her situation and contacted her attorney, who faxed a restraining order to the police station. The police showed up at the hospital when he came to take her home and arrested him for violating the restraining order.] He has federal charges pending, but the prosecutors are saying they will be lucky if he . . . gets two or three years. This woman doesn't want to leave the area. Her elderly parents are here; here is her home. But every time she has left, he has tried to stalk her and chase her. So it's not clear what can be done.<sup>120</sup>

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119. See *id.* For many Native women the situation is likely worse. There are few shelters that focus on services to Native women. Native women who turn to shelters run by non-Natives often face hostility and a helping environment dominated by values and traditions in tension with their own.

[B]attered Indian women become further disadvantaged by poverty, isolation, and society's prejudices against women. In seeking to move away from the violence within their homes, many women come face to face with anti-women and anti-Indian hostility in the form of institutional and agency racism.

BALZER ET AL., *supra* note 95, at 14; see also Lemyra DeBruyn et al., "It's Not Cultural": Violence Against Native American Women, in BALZER ET AL., *supra* note 95, app. at A-1, A-7 (reporting that in 1990 there were less than 10 shelters nationwide with services specifically focused on the needs of Native women). The introduction of new federal funding passed as part of the VAWA, 42 U.S.C. §§ 13931-14040, is providing greater services and interventions for Native women. See Telephone Interview with Eileen Hudon, *supra* note 114.

120. Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author).

These obstacles to stopping domestic violence only tell a part of the story, however. Some scholars conclude that despite the material and cultural assaults on the status of Navajo women, the result has been “only a slight erosion of their status.”<sup>121</sup> Living arrangements, particularly in more rural areas, remain centered on the wife’s family.<sup>122</sup> Women, especially mothers, continue to be held in high esteem and to play significant leadership roles.<sup>123</sup> In addition, there is a small but very active anti-domestic violence movement. Battered women’s advocates have pressed for domestic violence legislation,<sup>124</sup> have trained judges of the Navajo Nation courts,<sup>125</sup> and have urged greater social service funding for victims.<sup>126</sup> They operate

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121. Shephardson, *supra* note 58, at 175 (quoting Scott C. Russell & Mark B. McDonald, *The Economic Contributions of Women in a Rural Western Navajo Community*, 6 AM. INDIAN Q. 262, 263 (1982)). Other research finds that Navajo women who maintain close ties with other Navajo women and with the reservation are more likely to retain household authority and to believe in gender-egalitarian relations than are more isolated women, who are more likely to convert to Christianity or Mormonism and adopt beliefs in male control of households. See Chato & Conte, *supra* note 77, at 242. Current efforts to revitalize Navajo common law offer hope that women’s status will improve. In addition to traditional Navajo law, the Navajo Nation Council adopted equal rights legislation in 1980 that bars discrimination on the basis of sex. See *id.* at 243. The Navajo Nation have had a Navajo Office for Women since 1984. See *id.*

122. See, e.g., Chato & Conte, *supra* note 77, at 233–34 (noting that in rural areas a traditional camp consists of sisters, their husbands, and their children); Shephardson, *supra* note 58, at 175 (stating that some studies of rural Navajo women find they retain high status because of their arts and craft work and elements of localized matrilineages, and that large extended matrilineal families persist). For a slightly older study of gender relations, see generally LAMPHERE, *supra* note 58. Lamphere found, as have other researchers, that when Navajo are asked where a young couple should live, the answer is with the wife’s family. See *id.* at 77. This is the traditional Navajo living arrangement. See Zion & Zion, *supra* note 21, at 411, 414.

123. See Chato & Conte, *supra* note 77, at 234. The authors describe women in rural areas as being “at the heart of economic activities” and note that “older women receive the most respect and have greatest authority over the allocation of the labor, products, and cash.” *Id.* However, they also note that changes in divorce law have stripped women of some of their traditional sources of economic power. See *id.* at 234–35.

124. See Telephone Interview with Chris O’Shea, *supra* note 17.

125. See Telephone Interview with Gloria Champion, director of Shiprock Home for Women and Children (Oct. 1998) (notes on file with author); Interview with Crownpoint Peacemakers, *supra* note 9.

126. Bird and Champion have been particularly active in providing domestic violence related training for peacemakers and judges. See Interview with Peggy Bird and Jennifer Skeet, *supra* note 17; Telephone Interview with Gloria Champion, *supra* note 125. Navajo Nation Council Woman Genovese Jackson, with the assistance of former DNA Legal People’s Services attorney Chris O’Shea, drafted domestic violence protection order legislation that was enacted in 1994. See Domestic Abuse Protection Act, NATION CODE tit. 9, §§ 1601–1667 (Equity 1995); Telephone Interview with Chris O’Shea, *supra* note 17. Bird, Champion, and Jackson have pushed for increased funding for domestic violence treatment. See Interview with Gloria Champion, *supra* note 17. The chief prosecutor for the Navajo Nation, Donovan Brown, and Window Rock District Prosecutor Sharon Tsingine are currently working with anti-domestic violence advocates to implement prosecution policies in compliance with VAWA funding obligations. See Interview with Sharon Tsingine & Donovan Brown, *supra* note 17.



batterer's treatment and education programs<sup>127</sup> and shelters for battered women.<sup>128</sup> As a result of these efforts and those of the Navajo judiciary, the Navajo Nation Council initiated hearings in 1991 to discuss domestic violence in the Navajo Nation.<sup>129</sup> The immediate impetus for these hearings was the deaths of two women within a year, both killed by intimates.<sup>130</sup> As a result of the hearings, the council passed the Domestic Abuse Protection Act, which authorizes courts of the Navajo Nation to issue domestic violence protection orders.<sup>131</sup>

## B. Peacemaking: Theory and Practice

Ultimately . . . the greater necessity is that [tribal court] decision-making craft a jurisprudence reflecting the aspiration and wisdom of traditional cultures seeking a future of liberation and self-realization in which age-old values may continue to flourish in contemporary circumstances.<sup>132</sup>

Though the Peacemaker Courts<sup>133</sup> were first established in 1982, they were largely ignored until 1991, when the Supreme Court of the Navajo Nation began a push to reinvigorate modern Navajo law with Navajo common law.<sup>134</sup> In an endeavor to bring about cultural and social reform as well

127. For example, the Family Harmony Project in Crownpoint provides both treatment programs for men who batter and support groups for battered women. See Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17.

128. For example, the Shiprock Home for Women and Children in Shiprock provides shelter for battered women and their children.

129. See Zion & Zion, *supra* note 21, at 407.

130. See *id.*

131. See NATION CODE tit. 9, §§ 1651–1667; see also Valencia-Weber & Zuni, *supra* note 50, at 112–16 (discussing the legal remedies available for battered women in the Navajo Nation and among other tribes). The Navajo Nation Code's domestic protection order statute provides more broad-based protection than do most other states and tribes. See *id.* at 99 n.143. For example, the code offers protection to clan members, former members of an abuser's immediate residence area, and coworkers. See NATION CODE tit. 9, § 1605(B). As a result, the number of petitioners has been so overwhelming that the courts have enlisted the assistance of domestic violence commissioners hired specifically to hear only protection order cases. See Interview with Peggy Bird and Jennifer Skeet, *supra* note 17.

132. Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 413.

133. The word "court" is no longer used to refer to Peacemaking; instead, the formal name is now the "Peacemaker Division of the Judicial Branch of the Navajo Nation," or "Hozhooji Naat'aanii," the Navajo term. See James W. Zion, Briefing Paper: Enforcement of Decisions in Navajo Peacemaking 1–2 (Feb. 28, 1997) (unpublished manuscript, on file with author). This change was designed to make the courts more accessible and to advertise their difference in process and outcome from tribal courts, which are styled on the Anglo model.

134. See *An Interview with Philmer Bluehouse*, *supra* note 21, at 165. In 1991, the judiciary received a grant to promote the use of the Peacemaking system. Philmer Bluehouse, Freddie Miller,

as legal reform, the Navajo Supreme Court is attempting to integrate traditional Navajo law into all adjudicatory functions.<sup>135</sup> The general premise is that Anglo justice, described as hierarchal and “win-lose,” has failed the Navajo.<sup>136</sup> They argue that the only hope for Navajo people is a return to the problem-solving methods that worked in early Navajo history.<sup>137</sup>

The Honorable Robert Yazzie, Chief Justice for the Supreme Court of the Navajo Nation, contrasts the Navajo concept of “horizontal” justice with the Anglo “vertical” system of justice.<sup>138</sup> The latter uses coercion and power, focuses on finding “truth,” and limits standing to parties who claim direct injury, and its criminal law focuses on establishing guilt.<sup>139</sup> In contrast, horizontal justice systems have a much wider “zone of dispute”<sup>140</sup> and rely on moral suasion rather than coercion and power. The emphasis in horizontal justice systems is on healing rather than on guilt. Yazzie argues that the term “‘guilt’ implies a moral fault which commands retribution,” but the end goal of Navajo law is not fault finding but “integration with the group” accomplished through “nourishing ongoing relationships with the immediate and extended family, relatives, neighbors and community.”<sup>141</sup> Thus, Peacemaking is premised on traditional Navajo jurisprudence in which “law is not a process to punish or penalize people, but to teach them how to

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and Anita Roan were given the responsibility of creating Peacemaking courts throughout the Navajo Nation. See *id.* at 161.

135. See Austin, *supra* note 4, at 46. See generally Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992*, 18 AM. INDIAN L. REV. 379 (1993) (describing the use of Navajo common law in published opinions of the Navajo judiciary); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

136. See Interview with Raymond Austin, *supra* note 14 (“Anglo culture doesn’t work for us . . .”). The Supreme Court of the Navajo Nation is working to incorporate traditional ways into the court system. See *id.*

137. See *id.*; see also Interview with Philmer Bluehouse, *supra* note 15.

138. See Yazzie, *Life Comes from It*, *supra* note 21, at 178 (“There are many victims of any crime. They include the direct recipients of the harm and those who depend on them, family members, relatives and the community.”). See generally ZION & MCCABE, *supra* note 56.

139. See Yazzie, *Life Comes from It*, *supra* note 21, at 177–80.

140. See Mary Jo Brooks Hunter, *Commentary: Making the Invisible Visible: Historical Perspective*, 1 J. GENDER RACE & JUST. 89, 90 (1997) (quoting Navajo Chief Justice Yazzie as stating that the “zone of dispute” in horizontal systems of justice such as Peacemaking is wider than in “typical adversarial system[s]”). Justice Yazzie relates a story of criminal adjudication in which an elderly woman repeatedly raised her hand from the courtroom gallery, urgently signaling her wish to be recognized by the judge. See Interview with Robert Yazzie, *supra* note 14. Finally, the judge asked her what she wanted. “I’m the defendant’s mother,” she responded; “don’t I get to speak?” The judge reluctantly informed her that unless she was called as a witness by the defense or the prosecution, she did not get to speak. See *id.* Justice Yazzie argues that the mother should have been involved in the process and that Peacemaking allows this involvement. See *id.*

141. Yazzie, *Life Comes from It*, *supra* note 21, at 182. Emotion is a constituent part of law under this view. See *id.* at 180 (“I insist that any definition of ‘law’ must contain an emotional element: one of spirit and feelings.”).

live a better life. It is a healing process that either restores good relationships among people or, if they do not have good relations to begin with, fosters and nourishes a healthy environment."<sup>142</sup>

Traditional Navajo thinking does not separate religious and secular life; rather, all of life is sacred and imbued with spiritual meaning. The concept of *k'e*, fundamental to Navajo common law, expresses an interdependence and respect for relationships between humans, the natural world, individuals and family, and individuals and clan members.<sup>143</sup> This interdependence operates to define Navajo common law, which derives from relational frameworks in which "responsibilities to clan members are part of a sophisticated system that defines rights, duties, and mutual obligations."<sup>144</sup> "The individual and the community are part of the kinship that exists among all life forms and the environmental elements. Harmony is the desired result of the relationship with all life forms, including humans, animals, and plants."<sup>145</sup> Relational justice does not necessitate the subordination of the individual, however. Traditional Navajo thought and law are radically egalitarian and eschew coercion.<sup>146</sup> Individuals do not speak for others, not even for members of their own family.<sup>147</sup>

These concepts of relational justice provide the foundation for the practice of Peacemaking. In Peacemaking, parties meet with a peacemaker and others who have either a special relationship to the parties (e.g., family and friends) or relevant expertise (e.g., alcohol treatment counselors and hospital social workers).<sup>148</sup> Each participant is given a chance to describe the problem

142. Yazzie & Zion, *supra* note 2, at 160–61.

143. Justice Austin described the world as being divided into a pie: animals, humans, spiritual beings, dirt, sky, cosmos—everything. See Interview with Raymond Austin, *supra* note 14. He explained that there is a spark of the creation in every thing that comprises the pie. See *id.* Therefore, each piece owes the others respect. See *id.*; see also Yazzie, *Life Comes from It*, *supra* note 21, at 182 (describing the concept of *k'e*).

144. See Austin, *supra* note 4, at 8 (noting that an individual who behaves badly acts "as if he had no relatives"). Much of Native American jurisprudence, including that of the Navajo, is said to derive from a relational understanding of justice, rather than from an individual framework of rights. See *id.* at 10; Pommersheim, *supra* note 132, at 436–41.

145. Valencia-Weber & Zuni, *supra* note 50, at 87.

146. See LAMPHERE, *supra* note 58, at 41; Austin, *supra* note 4, at 8.

147. See Austin, *supra* note 4, at 8; see also LAMPHERE, *supra* note 58, at 39.

If someone comes to borrow a shovel or wagon that belongs to the mother of the household, a daughter might say *shimá bóholnítíh* ("my mother, its her business"), '*éi 'aa dimí* ("you ask her"). If the mother is not at home, the individual making the request must return later, since no one except the owner has the right to dispose of the property . . . .

*Id.*

148. See Notes on Peacemaking Session, *supra* note 11 (observing participation by a hospital social worker in a Peacemaking session).

that the petitioner has identified as the reason for the session.<sup>149</sup> The peacemaker then leads the group in developing recommendations and agreements designed to ameliorate or solve the problem.<sup>150</sup>

Peacemaking is structured around procedural steps. It begins with an opening prayer in both Navajo and English.<sup>151</sup> After the peacemaker has explained the rules, the petitioner is allowed to explain his or her complaint. The respondent is then asked to respond to the petitioner's complaint.<sup>152</sup> Next, the peacemaker provides a "[b]rief overview of the problem as presented by the disputants."<sup>153</sup> Family members and other participants, including traditional teachers, may then join the discussion, providing their description or explanation of the problem(s).<sup>154</sup>

The peacemaker, usually chosen by his or her chapter,<sup>155</sup> is a respected person with a demonstrated knowledge of traditional Navajo stories.<sup>156</sup> He or she must be someone who possesses the power of persuasion, because peacemakers do not judge or decide cases. Their power lies in their words and their influence. Peacemakers "show a lot of love, they use encouraging words, [when you] use [Navajo] teaching to lift [participants] up you can accomplish a lot, [if you] are very patient."<sup>157</sup>

Peacemaking may be hard for outside observers to understand, because it seems to combine so many different things: mediation,<sup>158</sup> restorative justice,<sup>159</sup>

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149. See *id.*

150. See generally James W. Zion, *The Dynamics of Navajo Peacemaking* 7 (Apr. 24, 1997) (unpublished manuscript, on file with author).

151. Indeed, most Peacemaking is conducted in both English and Navajo. Many middle-aged and younger Navajo are not fluent speakers of Navajo. See Interview with Leo Natani, *supra* note 12. Prayer "helps to purify your mind so that you can focus on the problems at hand." Interview with Raymond Austin, *supra* note 14.

152. See Philmer Bluehouse, *Training Materials for Community Education* (Apr. 20, 1999) (unpublished manuscript, on file with author). These training materials admonish peacemakers, while in the investigation and questioning phase, to do the following: permit ventilation; remind parties of the rules when necessary; keep objective toward resolution; encourage open communication; allow the use of supporting documents; and allow conferencing with the referring judge when necessary. See *id.*

153. *Id.*

154. "The opinions and feelings of both the 'victim' and the 'perpetrator' are important, as are those of their relatives." Zion & Yazzie, *supra* note 5, at 78.

155. See *An Interview with Philmer Bluehouse*, *supra* note 21, at 165. Chapters are local units of governance. See NATION CODE tit. 2, §§ 4001-4021 (Equity 1995).

156. See PEACEMAKER CT. R. 2.1(a), in ZION & MCCABE, *supra* note 56, at 102 (providing that to be a peacemaker a person must have "the respect of the community . . . and a reputation for integrity, honesty, humanity and an ability to resolve local problems").

157. Interview with Crownpoint Peacemakers, *supra* note 9.

158. See, e.g., Lieder, *supra* note 5, at 35-36 (describing Peacemaking as mediation).

159. See generally Yazzie & Zion, *supra* note 2.

therapeutic intervention,<sup>160</sup> family counseling,<sup>161</sup> and Navajo teaching.<sup>162</sup> Understanding is also made more difficult because of the significant differences in the practice of various peacemakers<sup>163</sup> and the different approaches used for different kinds of problems.<sup>164</sup> Peacemaking practice is fluid, flexible, and thoroughly practical, fitting the process to the situation.<sup>165</sup> As Phil Bluehouse, coordinator for the Peacemaker Division, relates:

[I]f there's no flexibility [in Peacemaking], we'll be doing a disservice. . . . [I] prefer [the] middle ground leaning more towards flexibility, because to me, that's the nature of the human being. . . . I encouraged fluidity over the process. Be dynamic, be explorative. . . . The court[s] compartmentalize, its *this* kind of case or *that* kind of case. I say, we're dealing with human beings . . . .<sup>166</sup>

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160. Peacemaking could be described as an example of therapeutic jurisprudence. See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 193 (1997) (describing domestic violence as a "therapeutic" concern of therapeutic jurisprudence). "Therapeutic jurisprudence suggests that, other things being equal, positive therapeutic effects are desirable and should generally be a proper aim of law, and that antitherapeutic effects are undesirable and should be avoided or minimized." *Id.* at 188 (footnote omitted). See generally Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43 (1995).

161. See, e.g., Zion & Yazzie, *supra* note 5, at 82 ("Navajo peacemaking addresses other psychological problems. It is a form of counseling.")

162. See Interview with Ruthie Alexis, *supra* note 12; Interview with Crownpoint Peacemakers, *supra* note 9; Interview with Leo Natani, *supra* note 12.

163. My review of Peacemaking files, as well as my interviews with peacemakers and with Bluehouse, suggests that peacemakers may vary in their approach. See Interview with Philmer Bluehouse, *supra* note 15; Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

164. For example, peacemaker practice in domestic violence cases varies. Some peacemakers believe that there are cases too severe or too dangerous to be handled in Peacemaking. Others believe that no case is inappropriate for Peacemaking. Some would postpone a case if the wife is afraid. See Interview with Crownpoint Peacemakers, *supra* note 9; Interview with Leo Natani, *supra* note 12. There may also be differences in judicial practice. For example some judges believe they have no authority to order an unwilling party into Peacemaking, despite the apparent formal authority to do so. Compare Interview with Mae Horseman, *supra* note 13 (stating that a judge has no authority to order unwilling parties into Peacemaking), with PEACEMAKER CT. R. 6.2, in ZION & MCCABE, *supra* note 56, at 109 (stating that a court may order civil litigants into Peacemaking on a finding of good cause).

165. See Interview with Philmer Bluehouse, *supra* note 15. This is not to say that there are no boundaries, nor is it to say that there are no practice norms. Boundaries exist, for example, with regard to the ethical behavior of peacemakers concerning abuse of process at the expense of the accused in criminal court cases. See PEACEMAKER CT. R. 2.2(e), in ZION & MCCABE, *supra* note 56, at 103 (peacemakers may not use force, violence or engage in acts that violate the Navajo Bill of Rights). Practice norms may exist as well. For example, the Peacemaker Court Rules allow for *nalyeeh* (reparations), but in talking with several peacemakers and peacemaker liaisons, none could give me an example of a case in which *nalyeeh* was given other than to compensate for property damage. See Interview with Leo Natani, *supra* note 12; Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

166. Interview with Philmer Bluehouse, *supra* note 15.

The *Peacemaker Court Manual* also stresses the need for flexibility:

It cannot be stressed, repeated or urged enough that the Peacemaker Court . . . is not frozen in its present form forever. As an experiment which has been carefully built upon Navajo custom and tradition, we will have to see whether it meets the needs of the Navajo People . . . , and we will have to see what changes need to be made.<sup>167</sup>

Peacemaking is a formal part of the Navajo legal system, developed and overseen by the Navajo Nation judiciary.<sup>168</sup> There are two primary routes by which cases reach Peacemaking: court referral and self-referral. Criminal cases may be referred by the court as the result of diversion<sup>169</sup> or as a condition of probation.<sup>170</sup> The Domestic Abuse Protection Act creates special rules for domestic violence protection order cases: A referral to Peacemaking must be approved by the petitioner, and the peacemaker must have received special domestic violence training.<sup>171</sup> In all other civil cases, the rules allow courts to refer cases to Peacemaking over a party's objection, but in practice judges seldom refer civil cases involving allegations of domestic violence unless both parties agree to the referral.<sup>172</sup> In addition to court referral, Peacemaking may be initiated by a petitioner on a claim that he or she has been "injured, hurt or aggrieved by the actions of another."<sup>173</sup> Self-referred cases make up the majority of Peacemaking cases.<sup>174</sup> In a self-referred case, the peacemaker liaison seeks authorization from the district court to

167. ZION & MCCABE, *supra* note 56, at 157.

168. *See id.* at 101 (providing in Rule 1.4 that Navajo Nation judges appoint peacemakers to specific cases and in Rule 1.2 that pursuant to Navajo customary law and as authorized by NATION CODE tit. 7, § 204(a), which permits the use of Navajo customary law, the Navajo Supreme Court has the authority to create the Peacemaker Court).

169. *See* PEACEMAKER CT. R. 6.3(b), in ZION & MCCABE, *supra* note 56, at 109.

170. *See id.* Diversion requires the victim's consent, *see id.* 6.3(b), while the referral as a condition of probation does not, *see id.* 6.3(d). However, the common judicial practice, at least in domestic violence cases, appears to be to require the victim's consent in either case. *See* Interview with Marilou Begay, *supra* note 13 (asserting that cases involving domestic violence are not referred to Peacemaking without the victim's consent); Interview with Mae Horseman, *supra* note 13 ("It is something that we can't force them to go. We can't say, go to the Peacemaking. It is a choice they make.").

171. *See* NATION CODE tit. 9, § 1652 (Equity 1995). Victim consent to Peacemaking must "be in writing, read to the victim in her or his primary language, and signed by the victim." *Id.* § 1652(A). The consent form must tell the victim of his or her right to remove the proceeding to family court at any time. *See id.* § 1652(B). "Only peacemakers who have received specialized training in their primary language on the causes, symptoms and dynamics of domestic abuse shall be qualified to hear domestic abuse cases." *Id.* § 1652(C).

172. *See* Interview with Marilou Begay, *supra* note 13; Interview with Mae Horseman, *supra* note 13.

173. PEACEMAKER CT. R. 3.2(a), in ZION & MCCABE, *supra* note 56, at 105.

174. *See* Zion, *supra* note 133, at 2.

subpoena the respondent and all other necessary parties identified by the petitioner.<sup>175</sup>

### C. Peacemaking's Potential in Domestic Violence Cases: Systemic and Individual Responsibility and Transforming Context

While Peacemaking may offer other benefits,<sup>176</sup> I will focus my attention on three areas that highlight its potential advantages for some battered women. With regard to each area, I compare Peacemaking's approach with that of the predominant means of legal intervention in domestic violence cases: civil protection orders, criminal prosecution, and the use of batterer's treatment programs through diversion and probation in misdemeanor cases or as a remedy in civil protection orders.

I argue that Peacemaking offers three potential benefits for battered women: the ability to address both systemic and personal aspects of battering and thus disrupt the familial and social supports for battering; the ability to foster social and personal change through the use of traditional Navajo creation narratives based on gender-egalitarian understandings of male-female relations; and the ability to foster "safe connection"<sup>177</sup> that does not treat as pathology women's multiple loyalties, including their commitment to relationships with men who have been abusive.

#### 1. Peacemaking May Address Both Systemic and Personal-Responsibility Aspects of Battering

Battering is a systemic problem. "[I]ts distinctive character derives from how the convergent supports for male authority 'enter' an actual conflict and merge with the batterer's pattern of control during and *after* a conflict

175. See PEACEMAKER CT. R. 1.5, in ZION & MCCABE, *supra* note 56, at 102. It appears that district court judges usually approve subpoenas based on the recommendation of the peacemaker liaison. See Shiprock File Review, *supra* note 9.

176. One notable benefit not discussed here is the ability of Peacemaking to give voice to all of those hurt by the abuser's violence, including children and family members of both the victim and the abuser.

177. I borrow the term from Christine Littleton. See Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 52. In order to support women's "safe connection," legal doctrine should

[f]irst, change the batterer so that he fits within female models of community . . . . Second, decrease the cost of rupture to women, so that both sexes face roughly similar disadvantages from the potential break-up. . . . Third, increase the perceived costs of battering behavior. . . . Fourth, expand the options for community so that women might validate desires for connection without running the 50-50 risk battering male partners impose.

*Id.* at 52-53.

arises . . . .”<sup>178</sup> I identify four related ways in which the systemic nature of battering may be understood: Social structures support and maintain its existence; social and familial networks may support an individual batterer’s abusive behavior; batterers are sometimes themselves subjected to oppressive systems in ways that are relevant to their decision to batter; and battering is itself a system of behaviors that includes both physical and nonphysical means of control and domination. This part describes these systemic aspects of battering, the possibilities suggested by Peacemaking for addressing each of them, and potential problems with Peacemaking’s use.

a. The Systemic Nature of Battering: Societal and Familial Supports

[The] problems that battered women face are rarely linked to women’s subservient position within society and the family structure, sex discrimination in the workplace, economic discrimination, lack of child care, lack of access to divorce, inadequate child support, problems of single motherhood, and lack of educational and community support.<sup>179</sup>

Battering may be experienced as a personal violation, but it is an act facilitated and made possible by societal gender inequalities.<sup>180</sup> The batterer does not, indeed could not, act alone. Social supports for battering include widespread denial of its frequency or harm,<sup>181</sup> economic structures that render women vulnerable, and sexist ideology that holds women accountable for male violence<sup>182</sup> and for the emotional lives of families,<sup>183</sup> and that fosters deference to male familial control.<sup>184</sup> Batterers often use the political and economic vulnerability of women to reinforce their power and dominance

178. Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 115, 121 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

179. Schneider, *supra* note 55, at 568. Schneider urges a focus on “the batterer and the social structures that support the oppression of women and glorify violence” rather than a “focus . . . on the woman and her individual pathology.” *Id.*

180. As Evan Stark writes: “[W]hen we speak about ‘battering,’ we refer to both the pattern of violent acts and their political framework, the pattern of social, institutional, and interpersonal controls that usurp a woman’s capacity to determine her destiny . . . .” Stark, *supra* note 178, at 121–22.

181. See, e.g., Mahoney, *supra* note 49, at 10–19.

182. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 106–11 (1992) (noting the similarities between the criminal law concept of provocation and the justifications and excuses batterers give for their violence).

183. See EVELYN C. WHITE, CHAIN CHANGE 25–26 (1985).

184. See, e.g., DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE (1989) (describing a crosscultural study of 90 societies that found domestic authority to be associated with the frequency of wife-beating); ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 147–51 (1993) (describing the use of “male privilege” as a tactic to maintain control).



over particular women.<sup>185</sup> Thus, their dominance, or their attempts at dominance, are frequently bolstered by stigmatization of victims through the use of gender social norms that define the “good” woman (wife/mother).<sup>186</sup> Batterers also take advantage of the vulnerabilities of their victims, such as the victim’s economic dependence on the batterer<sup>187</sup> or on the state,<sup>188</sup> her status as an illegal immigrant,<sup>189</sup> her alcohol or drug dependency,<sup>190</sup> or her responsibility to provide and care for children.<sup>191</sup> Battering also increases women’s social and economic vulnerability. Battered women lose jobs, edu-

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185. Elizabeth A. Stanko argues that criminologists have too often narrowed their study of violence to only that violence that is criminalized, rather than the (legal) violence of the state or the violence of private actors that is systematically ignored or condoned by the state. See Elizabeth A. Stanko, *Challenging the Problem of Men’s Individual Violence*, in JUST BOYS DOING BUSINESS? MEN, MASCULINITIES, AND CRIME, *supra* note 1, at 32, 33; see also Margulies, *supra* note 40, at 1076 (asserting that “shortages of affordable housing can mean staying with an abusive partner and risking injury or even death,” that welfare restrictions may make leaving a batterer more difficult, and that the lack of legal representation for women can mean the difference between safety and danger); Meier, *supra* note 41, at 222–23 (describing the difficulties that have kept poverty lawyers and domestic violence lawyers from working together). One woman I worked with in Honolulu described her decision some years earlier to return to her abusive husband. He had won custody of her young son and then attempted to burn down their vacant house, and the courts still would not modify the custody order. This woman concluded that her son would only have some measure of safety if she returned to the home. See Interview with Anonymous Woman Participant in Waikiki Community Center Family Violence Program, in Honolulu, Haw. (1988). Other women faced with the same circumstance have taken their children and gone into hiding. See Interview with Anonymous Shelter Resident in Advocates for Battered Women Shelter, in Little Rock, Ark. (1984).

186. See James Ptacek, *Why Do Men Batter Their Wives?*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 32, at 133, 147. The fear of economic and social marginality attending single women and especially single mothers may create an additional incentive to give a battering relationship another try. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 106 (1995) (discussing the portrayal of single mothers as deviant); Raphael, *Feminist Theory of Welfare Dependency*, *supra* note 33, at 217–18 (writing that the low benefits of Aid to Families with Dependent Children encourage poor mothers to become involved with men who offer financial help, but who also abuse them).

187. Women’s subordinate social status and economic power relative to that of men may be a necessary but not sufficient condition for wife-beating to be widespread in a society. See LEVINSON, *supra* note 184, at 88 (stating that in crosscultural studies, the following four factors are the strongest predictors of frequent wife abuse: “sexual economic inequality, violent conflict resolution norms, male domestic authority, and divorce restrictions for women”).

188. See Raphael, *Feminist Theory of Welfare Dependency*, *supra* note 33, at 217–18.

189. See, e.g., Cecelia M. Espenozza, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQUETTE L. REV. 161 (forthcoming Oct. 1999); Lauren Gilbert, *Family Violence and the Immigration and Nationality Act*, IMMIGR. BRIEFINGS, Mar. 1998, at 1; Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665 (1998); Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313 (1995).

190. See DUTTON, *supra* note 34, at 64 (discussing substance abuse among battered women); GINNY NICARTHY, *GETTING FREE: A HANDBOOK FOR WOMEN IN ABUSIVE RELATIONSHIPS* 223 (1982) (providing advice for women who are addicted to drugs or alcohol).

191. See Mahoney, *supra* note 49, at 19–20.

cational opportunities,<sup>192</sup> careers, homes, and savings.<sup>193</sup> They may also lose relationships with family and friends that might otherwise provide material aid.<sup>194</sup> Women become homeless as a result of battering,<sup>195</sup> their homelessness is made more difficult to remedy because they are battered,<sup>196</sup> and they are more vulnerable to further battering because they are homeless.<sup>197</sup> Women on the run, avoiding a batterer, are unable to stay long in one place, unable to participate fully in job training programs and housing programs, and unable to wait out the long lists required for government-sponsored childcare. Women involved with someone who batters find their efforts at economic self-sufficiency sabotaged.<sup>198</sup>

While larger social forces create the social landscape that makes battering possible, the batterer's personal supports for controlling behavior may be critical in his decision to batter. The most important of such supports may be his experience in his family of origin<sup>199</sup> and his relationships with friends.<sup>200</sup> Lee Bowker's research found that abusive husbands who saw their friends daily committed more severe and more frequent acts of wife abuse, were more likely to assault children, and were more likely to assault their partner while pregnant than were men who saw their friends less frequently.<sup>201</sup> Bowker suggests that "[t]hese correlations point to the possibility of a male peer subculture of violence that justifies wife beating, and strongly suggests that the better integrated the battering husband is into this peer subculture, the more severely he is likely to beat his wife."<sup>202</sup>

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192. See Raphael, *The Unexplored Barrier*, *supra* note 33, *passim* (describing the manner in which battering men sabotage welfare-to-work efforts by women); Zorza, *supra* note 33, *passim* (describing the manner in which battering makes women homeless); see also Meier, *supra* note 41, at 215 ("[F]or many poor women, their inability to develop or maintain economic self-sufficiency is the result of violent victimization and intentional sabotage by abusers.").

193. I speak from my personal experience as a social worker and attorney working for and with battered women since 1978. This work includes serving as a shelter staff member, a coordinator of a community-based domestic violence program, a professional trainer, and a counselor for battered women and for men who are court-ordered to batterer's treatment groups.

194. See *supra* note 193.

195. See generally Zorza, *supra* note 33.

196. See generally Green, *supra* note 40.

197. See *id.* at 172.

198. See generally Raphael, *The Unexplored Barrier*, *supra* note 33.

199. See, e.g., J.J. Gayford, *Battered Wives*, in INTERNATIONAL PERSPECTIVES ON FAMILY VIOLENCE 123, 125 (Richard J. Gelles & Claire Pedrick Cornell eds., 1983) (stating that 40% of the abusive men studied were exposed to violence during their childhoods).

200. See LEE H. BOWKER, BEATING WIFE-BEATING 54 (1983).

201. See *id.* at 54-55. This finding may be confounded by its correlation with alcohol and drug use. See *id.* (finding that increased social embedment, as measured by daily time with friends, is correlated with use of alcohol and psychoactive drugs). In other words, men who see their friends daily are likely to be men who drink and use drugs with their friends daily.

202. *Id.* at 54.

Also significant are the number of abusers who experienced or witnessed violence in their homes of origin,<sup>203</sup> with the strongest correlation being for those men who witnessed their father abusing their mother.<sup>204</sup> Thus, some number of abusers may have family members who tacitly approve of wife-beating or who are long practiced in denying its existence.<sup>205</sup>

Peacemaking may address societal and familial support for battering in two ways: through confronting family and batterer denial of battering's existence and its harm and through gaining material assistance for the victim. Peacemaking may confront the denial of the abuser—denial that he committed the violence, that it was harmful, and that it was a moral choice not compelled either by the victim's "provocation" or by life's circumstances.<sup>206</sup>

203. See Gayford, *supra* note 199, at 125.

204. See *id.* at 125–26.

205. One must be careful not to overstate this point. A significant number of child victims and witnesses are nonviolent adults, and a significant number of wife batterers experienced no violence in their home of origin. The point of familial condonation can also be overstated. Men whose mothers escaped or were successful in stopping battering may be unlikely to condone or deny their sons' violence. See generally BOWKER, *supra* note 200 (describing the various strategies women used to solve the problem of domestic violence). Similarly, fathers who have reformed their behavior may be quick to intervene in their sons' violent behavior. The point here is that for some number of abusers, family members are likely to reinforce thought and behavior patterns that are related to abuse. See, e.g., PENCE & PAYMAR, *supra* note 184, at 50 (describing the "self-talk" of battering men that encourages their minimization, denial, and blame of the violence on others).

206. Peacemaking proponents argue that this is a major advantage of Peacemaking over "Anglo adjudication" in which the privilege against self-incrimination, the formality of the process, and its extreme adversary nature encourage defendants to deny responsibility. See Zion, *supra* note 150, at 6–7; see also Braithwaite & Daly, *supra* note 1, at 193 (making a similar argument for conferencing). Such claims may overstate the adversary nature of some domestic violence hearings, particularly in cases charged as misdemeanors, in which defendants frequently have the option of diversion or probation. See, e.g., Linda Dakis & Lauren Lazarus, *Attacking the Crime of Domestic Violence: How Dade County is Protecting the Victim and Punishing the Perpetrator*, FAM. ADVOC., Spring 1997, at 46, 47, 49 (explaining that the Miami-Dade County domestic violence court uses pretrial diversion for carefully screened batterers); Judge Amy Karan et al., *Domestic Violence Courts: What Are They and How Should We Manage Them?*, JUV. & FAM. CT. J., Spring 1999, at 71, 77–78 (explaining the benefits of a dedicated domestic violence court, including the use of standardized treatment programs for batterers); Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 348–49 (1994) ("Probation in Quincy usually includes participation in a mandatory, long-term batterers' treatment program."). In other locales, defendants are likely to receive little or no punishment at all. See, e.g., Marjory D. Fields, *Criminal Justice Responses to Violence Against Women*, in PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN CRIMINAL JUSTICE 199 (Anthony Duff et al. eds., 1994). Fields, a New York trial judge, writes:

[New York] [j]udges prefer adjournments [in domestic violence cases] in contemplation of dismissal (ACD), which are pre-trial compromises, because they take less court time . . . . The penalty for the defendant's failure to comply with the ACD conditions is restoration of the case to the court calendar for trial. This is well known to be an empty threat, because the prosecutors do not monitor compliance with the ACD conditions, and cannot reassemble the evidence to try a case four to five months stale . . . .

*Id.* at 202 (citations omitted). In summary, this is hardly the punitive extreme implied in

Peacemaking proponents argue that the ability of the victim, her family,<sup>207</sup> and the abuser's family to confront the abuser directly about his violence makes it harder for him to deny his wrongdoing.<sup>208</sup>

In a case involving family violence, a young man related his excuses, exhibiting denial, minimization and externalization. One of the people who listened was the young man's sister. She listened to his story and confronted him by saying, "you know very well you have a drinking problem." She then related the times she had seen him drunk and abusive. . . . [S]he told her brother she loved him very much and was willing to help him if only he would admit his problems. He did.<sup>209</sup>

Bluehouse described this confrontational aspect of Peacemaking:

[T]here may be issues of domestic violence where there's some denial, the victimizer may be intellectualizing which becomes very obvious in Peacemaking, because family members will know. [They will say,] "this doesn't sound like you." . . . [Family members may say,] "Uncle, I can't understand why you are talking to your family like this [in Peacemaking]; is this another side of you? We like this side of you, we'd like to see more of this side of you. We've seen you . . . deal with your wife in a cruel and inhumane [manner], so why all of a sudden in a Peacemaking room with a person from the outside [do you behave this way]?"<sup>210</sup>

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Peacemaking proponent literature. I argue that the potential differences in Peacemaking that matter for some battered women are in the resources made available to victims and the attempts to restructure the batterer's familial and social networks.

207. See Yazzie, *Life Comes from It*, *supra* note 21, at 183 ("The involvement of relatives assures that the weak will not be abused and that silent or passive participants will be protected." (footnote omitted)); Zion & Zion, *supra* note 21, at 424–25. Battered women's advocates doubt the ability of family members to protect the battered woman and point out that the woman's fear may keep her from asserting her own interests. See, e.g., Hooper & Busch, *supra* note 2, at 118–19. Loretta Frederick discusses a similar problem in sentencing circles. See Frederick, *supra* note 2 (describing a domestic violence abuser who claimed in a sentencing circle meeting that he beat his girlfriend because she dated other men, and noting that the discussion focused on her unfaithfulness and his resulting anger and concluded with a suggestion that the couple get married in order to "inject some stability into the relationship").

208. See Yazzie, *Navajo Peacekeeping*, *supra* note 21, at 99; Yazzie & Zion, *supra* note 2, at 165–66. Barry Stuart notes a similar effect for sentencing circles, a process somewhat similar to Peacemaking, used in Canada with First Nations offenders. See Barry Stuart, *Circle Sentencing: Turning Swords into Ploughshares*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES*, *supra* note 1, at 193, 201.

"[The] thing about the circle is that bullshit don't carry you as far as it does in Court. If you try [in circle] you don't risk being judged just by the suits [i.e., the judge and the lawyers] but by everyone who really counts in your life. [You] must keep the teachings [of the circle], speaking from the heart must tell it all, no bullshit, cause the people in the community, they know what's bullshit."

*Id.* (quoting Kwanlin Dun, offender, regarding his experience in a sentencing circle).

209. Yazzie & Zion, *supra* note 2, at 165.

210. Interview with Philmer Bluehouse, *supra* note 15.

Families cannot always be counted on to confront an abusive family member, however. Family members may deny, minimize, and blame the victim for the batterer's violence. Peacemakers note that parents in particular are prone to cover for their son and blame his partner.<sup>211</sup> Thus, peacemakers must confront familial or parental denial in order to confront the batterer's denial.<sup>212</sup> "[I]f there is a lot of denial you have to confront the person with respect and love, but you have to cut through [the denial], and you have to confront them."<sup>213</sup>

Denial and familial solidarity are not the only impediments to families confronting batterers. Family members—his or hers—may be too afraid of the batterer to confront him or too focused on hiding the past or current violence in their own households.<sup>214</sup> In such cases, if the batterer is confronted, it must be by the peacemaker.<sup>215</sup>

211. See Interview with Crownpoint Peacemakers, *supra* note 9.

212. See *id.*

213. *Id.* Other peacemakers also discussed the importance of breaking denial. See, e.g., Interview with Ruthie Alexis, *supra* note 12 ("So, whereas for me I think Peacemaking is positive, it is a positive thing where people will get in touch with their problems and break that denial, and I think that's important. When you can break someone's denial, you've made a lot of progress.").

214. A significant number of identified batterers relate histories of abuse in their families of origin. See, e.g., DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 58 (1995) (citing research findings by Murray A. Straus, Richard Gelles, and Suzanne Steinmetz that men who grew up in abusive households were three times more likely to hit their wives, see MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 100 (1980)). Battering in the battered woman's home of origin may also mitigate against gaining help there. For example, Zion relates the following story:

"[Jane related stories of sleep deprivation because of continued sleep disruptions in which her husband would] violently pull her from bed to confront her about her infidelity or the illegitimacy of the older child. . . . She softly told the story of being trapped by a brutal cowboy . . . . She was driven from her grandparent's home by rape and molestation, severely treated by her parents, treated as a captive by the denying father of her children, and given more abuse by her own family when she returned to it. She painted the picture of a brutal, male world, where abuse, accusations of sexual misconduct, and attempted rape were commonplace."

Valencia-Weber & Zuni, *supra* note 50, at 100–01 (quoting James W. Zion, *Jane Begay's Story* 6, 7 (1991) (unpublished manuscript, on file with the *St. John's Law Review*) (citing the testimony of a witness before a domestic violence subcommittee of the Navajo Nation Council in public hearings on domestic violence)). Jane Begay's story "reveal[s] the breakdown of her 'special reciprocal relations' in Navajo society that should have shielded her." *Id.* at 101.

215. Denial may not be limited to the parties. Peacemakers may also engage in the same societal denial of domestic violence's presence or its seriousness. As one battered women's advocate related:

[A trainer] was doing domestic violence training for peacemakers in [locale omitted]. The peacemakers were telling [the trainer], "this [domestic violence] does not happen here." [The trainer finally] said, "Uncle, grandfather, don't you remember what used to happen to [naming women who had been battered]? I was a little boy, [but] I remember that." [The peacemakers] quit saying that it did not happen. Only one peacemaker came up to [the trainer] later and told him that he was right to confront them.

Interview with Anonymous Battered Women's Advocate, in *Navajo Nation* (n.d.) (notes on file with author) (names and identifiers withheld at the request of the interviewee).

Peacemaking also provides a forum for the victim's family to intervene on her behalf. For example, in one case an uncle was a copetitioner with his niece. The uncle expressed concern that his niece's daughters took her husband's side in arguments and that both the father and the daughters verbally and physically abused the mother.<sup>216</sup>

In addition to encouraging family participation, Peacemaking may also provide a mechanism for transferring material resources to the victim, thus lessening her economic and social vulnerability. This could occur in three ways. First, the abuser or his family or both may agree to provide *nalyeeh*<sup>217</sup> (reparations) in the form of money, goods, or personal services<sup>218</sup> for the victim. *Nalyeeh* is a concrete recognition that the harm of battering is

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Denial, too, is a phenomenon in Anglo adjudication. See Mahoney, *supra* note 49, at 13–14. Mahoney describes the cultural denial evidenced in law's treatment of battering as unusual, while the personal experience of many of laws' actors proves its ubiquity. She writes:

Using the conservative estimate that domestic violence occurs in one quarter of households, at least four of the fifteen or more actors in an average criminal action—jurors, judge, and attorneys—probably will have experienced or committed at least one domestic assault. . . . [Therefore,] the response to and evaluation of the case before them will also include the unseen and unspoken ties that bind these participants to the fabric of their own lives, their parents' lives, and their children's.

*Id.* (footnotes omitted).

216. See Window Rock File Review, *supra* note 9. The peacemaker's notes state that "there is a lot of accusations and blaming going on, with the two older daughters . . . siding up with their father against their mother." See *id.* The family agreed to seek counseling, cease harassment, seek traditional counseling with a medicine man, and seek family counseling. The father agreed to seek alcohol rehabilitation services, and the mother agreed to attend counseling regarding her husband's alcoholism. Some time later, the wife wrote that while she had found counseling at the alcohol rehabilitation center to be very helpful, her husband had failed to attend. She therefore asked the peacemaker to file an order to show cause (why the husband should not be found in contempt of court, presumably). See *id.*

217. See Yazzie & Zion, *supra* note 2, at 168 (stating that the offenders' relatives help to pay *nalyeeh* to victims); Interview with Philmer Bluehouse, *supra* note 15 (describing the use of *nalyeeh* in Peacemaking). Despite the frequent references to *nalyeeh* in the literature on Peacemaking, my research left me confused about the degree to which *nalyeeh* is currently used in domestic violence cases. In my review of Peacemaking files, I found no domestic violence cases where *nalyeeh* was used. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9. In addition, one peacemaker liaison explained that *nalyeeh* was used only for the purpose of compensating a loss of property. See Interview with Leo Natani, *supra* note 12 (explaining that *nalyeeh* is usually only for property damage and the petitioner must show a receipt). This is unfortunate and may reflect the need for more peacemaker training regarding domestic violence. The Navajo Nation Code provides that peacemakers receive domestic violence training, NATION CODE tit. 9, § 1652(C) (Equity 1995), but at the time of my visit (1997), not all peacemakers had been trained, and both advocates and peacemakers complained that the training was too brief and too cursory. See Interview with Crownpoint Peacemakers, *supra* note 9.

218. For a description of the use of personal services and support from the batterer's family for the victim in a process similar in many respects to Peacemaking, see Braithwaite & Daly, *supra* note 1, at 200 (describing the role of the batterer's family in community conferencing).

real<sup>219</sup> and that responsibility for it extends beyond the individual batterer. In addition, both abuser and victim are likely to be referred to social service providers and to traditional healing ceremonies.<sup>220</sup> The assistance given by agencies and by traditional healers often results in increased community and governmental material support.<sup>221</sup> Finally, the victim's family may overcome past estrangement from the victim and agree to provide her with assistance.

Though it is not clear that extending such assistance to include goods, services, or both is now a common practice in Navajo Peacemaking, such an extension appears congruent with traditional Navajo practices.<sup>222</sup> Assistance of this kind may alter the battered woman's material conditions and decrease her vulnerability to ongoing battering. For example, his family members may agree to such help as loaning a car or providing transportation.<sup>223</sup> Her family members may agree to spend the night with her on a rotating basis.<sup>224</sup> In addition, bank accounts may be changed or split so that she has greater financial independence.<sup>225</sup> The agreement may also include assistance with job training, employment, or childcare. The subsequent reorganization of the financial priorities of the batterer's extended family may serve to emphasize the injustice done to the victim and, at the same time, to decrease the victim's vulnerability to the batterer's control.

Peacemaking may also provide material assistance through referrals to social service agencies and traditional healing ceremonies. Peacemaking agreements often include an agreement from the batterer to engage in

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219. See, e.g., Yazzie & Zion, *supra* note 2, at 168 (explaining that *nalyeeh* in a rape case may include the delivery of cattle to the victim, which "reinforces [the victim's] dignity and tells the community she was wronged").

220. Peacemaking routinely connects participants to social service providers. Notes on Peacemaking Session, *supra* note 11 (noting that referrals were made to alcohol treatment, counseling, child protective services, and hospital personnel in a Peacemaking session); Interview with Ruthie Alexis, *supra* note 12 (describing her practice of referrals to social service agencies). Service providers sometimes take part in the Peacemaking session. Peacemaking agreements sometimes include agreements to attend traditional ceremonies. See Yazzie & Zion, *supra* note 2, at 169.

221. For a discussion of the use of healing ceremonies in gathering material, social, and spiritual support for an individual, see *infra* notes 267–273 and accompanying text.

222. See, e.g., Yazzie & Zion, *supra* note 2, at 166 (describing a Peacemaking agreement for an unemployed father to meet his child-support obligations by cutting and hauling firewood for the mother until he got a job).

223. My recommendation borrows from that of Braithwaite and Daly, who suggest a method of community conferencing, a process similar to Peacemaking, in domestic violence cases in which family members provide assistance for the victim, including monitoring. For example, family members may live with the couple or allow the husband to live with them. See Braithwaite & Daly, *supra* note 1, at 194.

224. See *id.* at 194–95 (suggesting a similar strategy).

225. See *id.* at 200.

affirmative steps toward changed behavior, such as alcohol treatment and traditional healing ceremonies.<sup>226</sup> For example, in my file review of domestic violence cases, four of the fourteen that reached agreements<sup>227</sup> included the batterer's attendance in alcohol treatment and the woman's attendance in Alanon meetings.<sup>228</sup>

How does Peacemaking's ability to change material and familial supports for battering compare with prominent formal adjudication methods of domestic violence intervention? The well-publicized insistence that criminal justice systems treat battering as a serious crime has had a significant impact on public awareness and perceptions. This general awareness does not necessarily translate into more services for battered women, however. In criminal adjudication in particular, the "zone of dispute"<sup>229</sup> is narrowly focused on the offender and the state. There is no structural way of addressing the culpability of family in supporting the abuse or of recognizing family's interest in stopping it.<sup>230</sup> Thus, formal legal interventions offer little that disrupts familial supports for battering.

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226. See *supra* note 220 and accompanying text (discussing referrals to social service agencies). While referrals to other services are common, I found no referrals to batterer's treatment programs in my review of peacemaker files. However, one peacemaker liaison described referring a man to a batterer's program, and, in a different locale, a counselor in a batterer's treatment program told me that a number of referrals from local peacemakers had been received. See Interview with Leo Natani, *supra* note 12; Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17. It is not clear that there is widespread knowledge that the programs exist. See Interview with Philmer Bluehouse, *supra* note 15 (noting that there are so many community programs that it is hard to keep track of them all). Batterer's treatment programs are fairly new and may not be generally known. However, domestic violence training with peacemakers mandated by the Navajo Domestic Abuse Protection Act, NATION CODE tit. 9, §§ 1601–1667 (Equity 1995), is beginning to change this. See Telephone Interview #1 with Peggy Bird, *supra* note 115; Interview with Peggy Bird and Jennifer Skeet, *supra* note 17; Interview with Gloria Champion, *supra* note 17.

227. I identified 20 cases as verified domestic violence cases. See *supra* note 11 (describing the methodology used). No agreement was reached in three of the 20 cases. In three other cases the Peacemaking session never took place: In one case, the petitioner withdrew the petition before the Peacemaking session; the second case was postponed at the respondent's request (while a protection order hearing was held); and in the third, there was no evidence in the file of further action. Agreements generally included referrals to services, but in two domestic violence cases there were no referrals.

228. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

229. See Yazzie, *Life Comes from It*, *supra* note 21, at 182–83 (footnote omitted).

230. These issues, if addressed at all, are addressed in batterer's treatment programs. Such treatment programs challenge stock stories that support batterers' controlling behavior, but they do so largely in a vacuum, with only marginal control of what happens outside of the meeting. Batterer's treatment programs will suspend treatment and send an abuser back to court if they are aware of incidents of further abuse or threats of abuse. Many programs engage in routine checks with partners or ex-partners to determine whether abuse has reoccurred. Police reports or restraining order violations usually result in automatic suspension from the program. See generally PENCE & PAYMAR, *supra* note 184.



The ideal model for intervention proposed by battered women's advocates has been a "coordinated community response."<sup>231</sup> In a coordinated response, criminal sanctions are accompanied by strong supports for battered women. Prosecutors craft their strategies so as to maximize victim safety;<sup>232</sup> police provide victims with information about rights as well as referrals to services including shelters;<sup>233</sup> courts routinely order victim compensation; and detectives and prosecutors follow up with victims to monitor threats or intimidation tactics of the batterer.<sup>234</sup> In addition, the justice system works closely with service providers to assist women in safety planning and advocacy with other systems, such as public assistance, child protective services, and employers, and also to encourage support from victims' family and friends.<sup>235</sup> The reality in many jurisdictions, however, is very different.<sup>236</sup> Without these supports, legal intervention may not create the kind of change in either the victim's or the batterer's milieu necessary to provide real safety or to enhance the victim's autonomy.<sup>237</sup> The emphasis on legal intervention has served to develop prosecution and civil protection order proceedings without commensurate development of services and resources

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231. See, e.g., Barbara J. Hart, *Arrest: What's the Big Deal?*, 3 WM. & MARY J. WOMEN & L. 207, 207 (1997) ("[A]ctivists have not seen arrest as a panacea. They have not identified it as a unitary action, sufficient unto itself. Rather, activists have been calling for coordinated, comprehensive, and specialized intervention by all components of the legal and human services systems.").

232. See Mahoney, *supra* note 37, at 84 (describing a prosecution strategy designed to maximize a woman's safety and recognize the batterer's tactics of control).

233. A number of locales now require police to give victims written information regarding criminal justice intervention and the availability of civil protection orders as well as the phone numbers of local service providers. See Barbara Hart, *Battered Women and the Criminal Justice System*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 178, at 98, 104 (describing a Pennsylvania code that mandates that law enforcement provide victims with referral information).

234. Barbara Hart provides a thorough description of the strategies needed for a more effective criminal justice response to domestic violence. See *id.* at 103-13.

235. See *id.*

236. See Fields, *supra* note 206, at 202 (describing common judicial practice in domestic violence cases in New York). See generally Hart, *supra* note 233 (describing difficulties battered women face in the criminal justice processing of cases against their batterers).

237. It is not that punishing batterers does not help some women, but rather that it does not *always* help and that, even when it does help, it is seldom enough. While some women benefit from the collateral benefits of formal adjudication, these benefits are seldom assured. Frederick notes the following problems with the criminal justice system's treatment of battering: There are no advocates for full restitution for the victim of domestic violence; the system does not address restoration of the victim's autonomy; and the system does not encourage the community to see its role in battering through its minimization of the victim's danger, the seriousness of the violence, and the terror the victim feels, and through its failure to adequately fund shelters and advocates. See Frederick, *supra* note 2. Frederick concludes, however, that restorative justice processes present greater dangers to battered women than does the criminal justice system. See *id.*

for women. The compensation formally available through protection order statutes and criminal codes is seldom ordered by the court.<sup>238</sup>

Formal consequences of legal intervention are not the only way to measure success with regard to connection with material resources, however.<sup>239</sup> A woman's contact with the justice system may be autonomy-enhancing in ways that only marginally have to do with the operation of law.<sup>240</sup> For example, in addition to providing information regarding her legal rights and referrals to social services, court personnel may encourage her to contact estranged family members or other informal resources that, in turn, may provide material assistance. The protection order may be important evidence in a collateral fight.<sup>241</sup> The public censure involved in formal adjudication may encourage those who care about the batterer to recognize and

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238. See, e.g., Hart, *supra* note 233, at 111 (describing how, in Pennsylvania, neither restitution nor victim compensation has been predictably awarded). Indeed, some judges hearing petitions for protection orders are even hesitant to order child support, though protection order statutes allow such orders, under the theory that other courts are better able to handle such determinations. See Interview with Debra Weissman, former director of a legal services program in North Carolina, in Miami, Fla. (Jan. 1999) (notes on file with author) (describing the practice of some judges in North Carolina).

239. For example, debates over mandatory arrest policies frequently fail to locate the question in the broader landscape of work for social change. In part, it is the political work that engenders the pro-arrest and prosecution policies that will determine the effects of these policies on the lives of women in that community. If the ideology of the reform efforts is not in touch with the lives of the women they serve, they will not liberate. See generally Stark, *supra* note 178. When elite women argue for mandatory arrest policies, there is the real danger that it will be implemented in a way that blames battered women, most of whom seen by the court will be poor and minority, and it will pathologize their loyalties to family and to men. This is not an inevitable outcome, however. If mandatory arrest becomes the door through which women gain empowerment and have more choices, then it can serve the ends of liberation. The important thing is to ask all of the questions at once, to understand that battering happens within a myriad of both competing and mutually reinforcing subordinating experiences for many women. See generally Donna Coker, *Assessing Help Strategies for Battered Women: Material Resources and Poor Women of Color*, 33 U.C. DAVIS L. REV. (forthcoming Spring 1999) (arguing for assessing domestic violence intervention strategies for the likelihood that they increase battered women's material resources, with poor women of color operating as the "test case" for such assessment, and applying this assessment to pro- and mandatory-arrest policies).

240. I do not mean to diminish the importance of results that flow from legal intervention. Restraining orders allow women to establish custody and visitation with children, which in turn limits the batterers' ability to abduct the children and serves to organize child exchange in a way that protects battered women. Batterers may be ordered to compensate their victims for losses related to the battering.

I also do not intend to diminish the risks and negative outcomes of using legal intervention. Inviting the state into your intimate life always carries a risk. For example, a battered woman may find herself the subject of a child abuse or neglect investigation or lose her housing because of the "disturbance" created first by the violence and then by the arrest.

241. Examples include child custody litigation and a civil tort action against the abuser. See Mahoney, *supra* note 37, at 85-86 (describing attorney Kim Hansen's use of a power and control theory in a tort claim against a batterer).

intervene in his destructive behavior.<sup>242</sup> The restraining order may make timely police response more probable,<sup>243</sup> and, if the police refuse to enforce the restraining order, the order becomes a baseline from which to protest police behavior, and thus a focus for organizing with other battered women.<sup>244</sup>

Both Peacemaking and formal adjudication have the capability to connect battered women with community resources. However, the breadth of Peacemaking's reach and its reliance on clan and familial responsibility have the potential to alter the victim's social context in a way that may not be true of formal adjudication.<sup>245</sup>

b. The Systemic Nature of Battering: Oppression in the Batterer's Life and Peacemaking's Alternative to the "Responsibility Versus Description" Dichotomy

Battering is systemic in that in addition to the social supports for male abuse and privilege, many batterers are themselves subjected to oppressive systems,<sup>246</sup> including economic policies that result in an inability to support

242. See BOWKER, *supra* note 200, at 54 (noting that battering men who saw their friends daily were more likely to continue abuse than those who did not, suggesting the importance of friendship networks in supporting battering).

243. See, e.g., Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 227, 241 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (finding in a study of the effectiveness of domestic violence restraining orders that police came much more quickly, with more consistency, and were more supportive after women obtained restraining orders).

244. See Stark, *supra* note 178, at 127 (explaining that battered women's advocates use mandatory arrest policies to establish a baseline for police conduct and as an organizing focus when police deviate from the baseline).

245. In contrast are two cases in which it appears that only the couple were involved and there were no referrals for further assistance. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

246. Crenshaw writes that antiracist discourse and political organizations often overlook the existence of gender oppression within communities of color, while antisexist organizations and discourse overlook the existence of racism. See Crenshaw, *supra* note 39, at 1252. Conversely, male subordination of women may be a "defensive response to the economic, social, and political subordination produced by race discrimination and economic exploitation." Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 945 (1996). Iglesias notes that

[for women of color,] our racial and ethnic identities make it hard to accept images of men that threaten or degrade their masculinity. Part of being straight means loving and wanting men. Part of being colored means understanding the degree to which men experience their oppression as assaults on their manhood. Putting these two positions together may mean listening to what men say about their struggles to construct self-confident and other-affirming masculine identities.

*Id.* at 957-58 (footnotes omitted).

families,<sup>247</sup> racist structures that hurt individuals both materially and spiritually,<sup>248</sup> substance abuse and addiction,<sup>249</sup> and histories of horrific childhood abuse.<sup>250</sup> Peacemaking has the potential to recognize both individual moral responsibility and oppression in the life of the abuser.

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247. See, e.g., Etiony Aldarondo & Glenda Kaufman Kantor, *Social Predictors of Wife Assault Cessation*, in *OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE*, *supra* note 45, at 183, 189–90 (comparing assaultive husbands who were persistently violent with those who had ceased to be violent at the time of the study, and finding that family income was significantly higher in the cessation group); Richard J. Gelles, *Through a Sociological Lens: Social Structure and Family Violence*, in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE* 31, 33 (Richard J. Gelles & Donileen R. Loseke eds., 1993) (“[A]lthough family violence does indeed cut across social and economic groups, it does not do so evenly. The risk of child abuse, wife abuse, and elder abuse is greater among those who are poor, who are unemployed, and who hold low-prestige jobs.”).

248. See DURAN & DURAN, *supra* note 92, at 195 (describing a soul wound as both individual and collective).

249. The nature of the relationship of alcohol and drug abuse to domestic violence is the subject of controversy among researchers, but its correlation is a consistent finding of domestic violence research. See, e.g., DUTTON, *supra* note 214, at 12 (reporting research that found substance abuse syndromes in half of the wife abusers studied); Kenneth E. Leonard & Theodore Jacob, *Alcohol, Alcoholism, and Family Violence*, in *HANDBOOK OF FAMILY VIOLENCE* 383, 388 (Vincent B. Van Hasselt et al. eds., 1988). While some researchers argue that alcohol and drug abuse cause domestic violence, see, e.g., Jerry Flanzer, *Alcohol and Other Drugs Are Key Causal Agents of Violence*, in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE*, *supra* note 247, at 171, it appears that the relationship is more complicated than simple causality suggests. As Gelles and others point out, crosscultural research indicates that “differences in drinking behavior appear to be related to what people in each society believe about alcohol.” Richard J. Gelles, *Alcohol and Other Drugs Are Associated with Violence—They Are Not Its Cause*, in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE*, *supra* note 247, at 182, 184. The widespread belief in our society is that “alcohol and drugs release violent tendencies,” provide people with a “‘time-out’ from the normal rules of social behavior,” and “provide a socially acceptable explanation for [domestic] violence.” *Id.* The result of social definition is underscored by the finding that domestic abusers in one study overestimated their level of inebriation at the time of the assault. See *id.* at 186. Alcoholism may skew family dynamics in ways similar to that of abuse in which the nonabusing members attempt various strategies to cope with the abuser’s manipulative, blaming, and often unpredictable behavior. See Flanzer, *supra*, at 172–74.

The decision to focus on alcoholism as the cause of domestic violence may serve to hide other important variables. As Eduardo Duran and Bonnie Duran argue in a broader context, the emphasis on “[a]lcoholism as a disease entity reduces the economic and social problems within Native American communities to medical ones” and thus “distracts . . . from the multifactorial and structural analysis of [Native suicide, homicide, and injury rates.]” DURAN & DURAN, *supra* note 92, at 104.

250. Many studies find that significant numbers of men identified as batterers experienced violence in their homes of origin. See, e.g., Aldarondo & Kantor, *supra* note 247, at 188 (finding a high incidence of severe forms of child abuse reported by men who batter). Domestic violence researcher Donald Dutton suggests that a nested ecological theory may best describe battering’s etiology. Such a theory presumes that the interaction of characteristics of macrosystems (broad cultural values and belief systems), exosystems (social structures that impinge on a person’s immediate settings), microsystems (family unit or immediate context for the battering), and ontogenetic levels (individual development and psychological makeup) are related to battering’s causality in any given situation with any given batterer. See DUTTON, *supra* note 214, at 21, 24–32; see also

When describing male violence against women, we have no language, popular or legal, that recognizes the possibility of multiple determinants of behavior as well as moral agency without a concomitant tendency towards misogyny.<sup>251</sup> I refer to this inability to describe the batterer's context without diminishing his responsibility as the "responsibility versus description dichotomy." The abuser's context is relevant in Anglo jurisprudence only if it is introduced as mitigation, but as mitigation the introduction of such evidence is generally harmful to battered women because it too often encapsulates notions of female provocation.<sup>252</sup> Absent duress, criminal law doctrine places provocation between the either-or categories of insanity and free moral agency.<sup>253</sup> The resonance between social and legal understandings of provocation with cultural beliefs in women's power to incite male vio-

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JEFFREY L. EDLESON & RICHARD M. TOLMAN, INTERVENTION FOR MEN WHO BATTER: AN ECOLOGICAL APPROACH 11-15 (1992). Joan Meier suggests a similar *political* methodology:

[W]e have yet to envision the "story" of a batterer which would realistically synthesize the roles of male prerogative, woman derogation, and the impact of poverty in his abuse of women. Since the oppressions of poverty (combined with historic and contemporary racism) are ambient and shape not only individuals, but families, generations, and entire communities, such a story would require us to hold in our minds many levels at once: the historic and societal privations of racism and poverty, the way those privations across a community shape individuals, the patriarchal belief system that teaches that males are entitled to control and possess females, as well as an understanding of the personal feelings and motivations of the individual perpetrator and the victim.

Meier, *supra* note 41, at 234. I think Alice Walker accomplishes something very close. See ALICE WALKER, *THE THIRD LIFE OF GRANGE COPELAND* (1970).

251. Feminist scholars Mahoney and Schneider make a related point in their descriptions of law and culture's (false) dichotomy for battered women between victimization and agency. See generally Mahoney, *supra* note 37; Schneider, *supra* note 55.

Why is it so difficult to see both agency and oppression in the lives of women? . . . I have come to believe that the problem lies in part in prevailing social and legal concepts of agency. . . . [A]gency and victimization are each known by the absence of the other: you are an agent if you are not a victim, and you are a victim if you are in no way an agent. Mahoney, *supra* note 37, at 64; see also Schneider, *supra* note 55, at 548-49 ("We now alternate between visions of the battered woman as agent—as cause or provocateur of the battering—and the battered woman as helpless victim. . . . [P]ortraying women solely as victims or solely as agents is neither accurate nor adequate to explain the complex realities of women's lives.").

252. See generally Coker, *supra* note 182 (explaining that the criminal law concept of provocation resonate with the excuses and justifications that battering men offer for their violence, particularly their claims of justification (e.g., the "the bitch deserved it" defense) and their quasi-self-defense claims in which battering men cast themselves as victims of a woman's emotional or verbal "attack"); Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507 (1996) (describing gendered provocation notions in death penalty cases in which men kill intimate partners). For an empirical review of gender and provocation concepts in Model Penal Code states, see Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

253. See Coker, *supra* note 182, at 93. For a related discussion of how emotions are understood in law, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

lence<sup>254</sup> renders provocation notions in the context of domestic violence hopelessly misogynist: She pushed him too far; she deserved what she got.<sup>255</sup>

Attention to the context of the abuser's life threatens to devolve into victim blaming: He has a hard life, and she should be more supportive and understanding.<sup>256</sup> This is a serious danger because the batterer is often quite adept at "explaining" why he beats her: Life beats him, he was drunk, or his father was cruel.<sup>257</sup> In addition, stories that describe the abuser's violence as pathological and an illness fail to account for his choice of victims and for the peculiar vulnerability of wives, girlfriends, ex-wives, and ex-girlfriends. For Native women who are all too aware of the impact of racism and colonialism in the lives of Native men,<sup>258</sup> the mix of patriarchal rhetoric that

254. See, e.g., Coker, *supra* note 182, at 106–11; Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 131 (1992) (concluding that law's treatment of rape relies in part on a male innocence/female guilt paradigm in which "[w]omen are seductive and have the power, like the Sirens, to drive men 'wild,' to lose control, and therefore not to be responsible").

255. See Coker, *supra* note 182, at 104–06. The point here is not to criticize the operation of these categories in criminal law. (I do that elsewhere. See generally *id.*) The point is to suggest that the "responsibility versus description" dichotomy is an unnecessary dichotomy that limits the vision of anti-domestic violence work. It is not inevitable that recognition of context and support for battering diminish the perpetrator's responsibility for his violence. As Angela Harris writes,

crime does not simply emerge from structures of oppression and injustice; crime is committed by people who consciously make choices about their actions and how they wish their actions to be interpreted. The effort to prevent crime is incomplete without critical attention to why people choose to commit crimes, why they commit the crimes they do, and how they interpret their own lawbreaking behavior and that of others.

Harris, *supra* note 48, at 42. Harris argues for an "environmental justice" approach to crime in African American communities that acknowledges crime as both an "aspect of a much larger problem of social justice and economic distribution" and an individual moral choice. See *id.* at 23.

256. Some battered women's advocates may fear that implicating poverty or racism in battering's creation may threaten the broad-based political support for law reform. But see Crenshaw, *supra* note 39, at 1260, for a discussion of the way in which the politics of relating the need for domestic violence interventions to lawmakers, most of whom are upper-class, male, and white, in terms of "your mother, your daughter," makes invisible the suffering of battered women who are women of color or poor. I do not argue that men of color are more likely to batter. Indeed, research that is not dependent on official police reporting suggests that race, when not confounded by class and poverty, is not predictive of incident rate. See, e.g., Lettie L. Lockhart, *Spousal Violence: A Cross-Racial Perspective*, in BLACK FAMILY VIOLENCE: CURRENT RESEARCH AND THEORY 85, 91 (Robert L. Hampton ed., 1991) (presenting a study of African American and white women across three measures of social class, and finding no significant racial differences in domestic violence rates).

257. See Ptacek, *supra* note 186, at 141 (stating that batterers use the socially acceptable language of excuses and justifications to explain their violence). Additionally, the social expectations of female caregiving may serve to reinforce the batterer's invocation of the "good mother and wife" who stands by her husband. (No disrespect to Tammy Wynette intended.)

258. However, it is important to note that many domestic violence perpetrators are, in fact, non-Indian. See *supra* note 113 and accompanying text (reporting a recent Bureau of Justice Statistics study that finds that the majority of perpetrators of violence against Indians are non-Indians, including those who commit domestic violence).

"real" men are in control may intersect the reality of racist and colonial subordination to create a gendered and cultural double-bind.<sup>259</sup> This may be compounded by batterers' propensity to blame the victims for their violence.<sup>260</sup>

Despite these problems with attention to the batterer's context, focusing on his responsibility without attention to context provides an incomplete picture. The myriad social, spiritual, cultural, familial, addiction, and sex-hierarchy links to his violence are rendered invisible or irrelevant.<sup>261</sup>

Traditional Navajo thinking generally takes the pragmatic approach, assuming that certain qualities of human nature are "givens"; thus the question is, given human nature, how does one construct a world that best enables harmonious behavior?<sup>262</sup> Peacemaking proponents write that Native justice systems focus on restoring harmony of relationships rather than on

259. See BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 62 (1996) (describing the ways in which the sense of racial solidarity for some African American women creates a conflict with their needs as battered women); see also WHITE, *supra* note 183, at 25 ("Black women have been conditioned to repair the damage that has been done to black families because we feel it is our responsibility to keep the family together at all costs."); Rivera, *Domestic Violence Against Latinas*, *supra* note 40, at 248 ("Latinas face the precarious, often untenable situation of the 'double bind'—empowerment through the disempowerment of a male member of the community. The internal conflict and external pressures to cast police officials as outsiders, hostile to the community, frustrates the development of the Latinas' empowerment." (footnote omitted)).

260. See Adams, *supra* note 32, at 193; Ptacek, *supra* note 186, at 133, 147–49.

261. See, e.g., Gelles, *supra* note 247, at 31 (finding that poverty is correlated with domestic violence, though it is not a simple correlation). Meier makes a similar point in her article urging poverty law activists and battered women's activists to join forces. Meier does not urge the abandonment of criminal sanctions against domestic violence, but she suggests that battered women's activists may learn from poverty activists to have more compassion for (poor) battering men who are often themselves the subjects of economic and sometimes racial oppression. See Meier, *supra* note 41, at 234–35.

262. See, e.g., JOHN R. FARELLA, *THE MAIN STALK: A SYNTHESIS OF NAVAJO PHILOSOPHY* (1984) [hereinafter FARELLA, *THE MAIN STALK*]. Farella describes the lesson of the Navajo story, "When People Moved Opposite":

Here is the nature of man-woman relationships. They are intense, they are necessary, and they have certain characteristic, recurrent difficulties. What to do? There is no answer or solution, no prescription that will make it all right. But some sort of resolution is possible if you accept the givens of human existence, if your starting point is what necessarily is and cannot be changed, rather than what ideally should be. In this case that is the acceptance of the necessity of being with one another.

There is no final answer because there is no final answer. The truth is that the gods couldn't solve the difficulty, so they turn it over to man to do with it what he can. It is up to you as individuals, they say, to figure it out, to decide for yourselves. The ultimate Navajo moral imperative is not something as mundane as the golden rule; it is the statement, "It's up to you." There are no pretend, try-harder solutions to eternal problems. The best that we can do is to accept the givens of life, and momentarily resolve difficulties in terms of these givens.

JOHN FARELLA, *THE WIND IN A JAR* 60–61 (1993) [hereinafter FARELLA, *THE WIND IN A JAR*].

guilt-based adjudication.<sup>263</sup> However, contrary to the notion that this means that the offender is “let off easy,” relationship-oriented justice may mean that the offender is held to a higher level of responsibility than is true under adversarial adjudication. To understand why this may be so, it is useful to examine the Navajo concept of *nayéé’*, or “monsters” as it is commonly translated in English. According to anthropologist John Farella, a monster is “anything that gets in the way of a person living his life.”<sup>264</sup> *Nayéé’* include depression, obsession, and jealousy.<sup>265</sup> The benefit of naming something a *nayéé’* is that the source of one’s “illness”—one’s unhappiness or dysfunctionality—once named may be cured.

[T]he vague and subjective is transformed into something very concrete . . . merely by labeling the experience. . . . This is what ritual is about, making the intangible exquisitely real and then manipulating it. The second thing that must happen is that society must be altered. People must expect the patient to be transformed, and they must participate in that transformation.<sup>266</sup>

Healing ceremonies are designed to rid a person of *nayéé’*, whether the monster’s presence is reflected in physical or emotional ill health.<sup>267</sup> Healing

263. See Yazzie, *Life Comes from It*, *supra* note 21, at 180–87; Zion & Yazzie, *supra* note 5, at 83.

264. FARELLA, *THE MAIN STALK*, *supra* note 262, at 51. Some monsters are inevitable. When the warrior twins had rid the earth of its monsters, they found a cave where a handful of monsters remained: poverty, old age, hunger, and cold. These monsters persuaded the twins to spare their lives, arguing that they were necessary for the survival of the people. See PAULA GUNN ALLEN, *GRANDMOTHERS OF THE LIGHT: A MEDICINE WOMAN’S SOURCEBOOK* 76–77 (1991).

As Old Age woman pointed out, killing her would mean that the five-fingered beings would have no reason to have children. And when a boy reached his sexual peak, or a girl reached her womanhood, they would not engage in sex and much of the joy and depth of their lives would be lost. . . . Youth would lose its meaning, and wisdom [with age] would be unattainable. . . .

[If Cold Woman was killed] the heat of the sun would wither all of life . . . .

. . . [T]he Poverty Creature[s] . . . job was to help people care about themselves, their families, and the earth. Without the threat and fact of poverty, they said, no one would . . . ever make anything new. . . .

. . . Hunger Man explained that without him there would be no reason for people to cultivate plants. They would lose their taste for cooking and eating. Many of the pleasures of being together would be denied them.

*Id.*

265. See FARELLA, *THE MAIN STALK*, *supra* note 262, at 51.

266. See FARELLA, *THE WIND IN A JAR*, *supra* note 262 at 132.

267. See *id.*; Zion, *supra* note 150, at 15. The concept that a person who acts badly is out of balance, that his behavior is the result of monsters, may sound dramatically antithetical to notions of individual personal responsibility. When peacemakers describe cutting through denial—the denial of the abuser’s parents who say either “he doesn’t do that” or “she makes him do that” as well as the abuser’s denial—the truth that the peacemakers want the parents to realize is that “he DOES do that” and “she does NOT make him do that,” not that there are not forces at work that make it easier to batter (e.g., cultural forces that reinforce misogynist notions of a woman’s proper place) and forces that make his life difficult (e.g., poverty, racism). This recognizes the pull of



requires that the person be actively involved in the curing.<sup>268</sup> A healing ceremony is a costly endeavor for a family not only because it is expensive and involves time-consuming labor, but also because it threatens to expose the family to public scrutiny.<sup>269</sup> The family must commit to whatever ongoing healing requirements are imposed by the healer.<sup>270</sup> Thus, the very process of organizing a ceremony may shift familial understandings of the patient's illness and may (re)focus material and emotional resources on the patient's well-being. "The sheer work involved in organizing a ceremony functions to heal the social problems that are always associated with illness. . . . And the symbolism and re-enactment of the ritual makes an illness that was previously vague and unmanageable into something that is real and tangible enough to be manipulated."<sup>271</sup>

A healing ceremony, therefore, remakes the patient by attempting, in part, to remake his world: his story of himself, his family's story of him, and the material resources available to promote his well-being.<sup>272</sup> Peacemaking, at its best, is a healing ceremony; it seeks to remake the world—the batterer's world, creating the possibility of a different life and a different point of view, and the battered woman's world, marshaling resources and supporting her struggle for greater autonomy.<sup>273</sup>

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dangerous and destructive behavior—a pull that is social, gendered, and spiritual. See, e.g., JACK KATZ, *SEDUCTIONS OF CRIME* 130 (1988) (describing the allure for some men of engaging in dangerous behavior as a means of proving "manhood" when few other badges of manhood are available).

268. See FARELLA, *THE WIND IN A JAR*, *supra* note 262, at 130–31.

269. See *id.* at 131–32. Farella contrasts this with the treatment of sickness predominant in Western culture in which illness is often seen as individual, having no significant social component, and the cure is conducted in private and protected by doctor-patient privileges. See *id.*

270. See *id.*

271. *Id.* at 131.

272. See *id.* For a discussion of the importance of stories in shaping understanding and self-concept, see ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800*, at 83–85 (1997) (describing the importance of stories in determining the law of treaties with Native American tribes). Elizabeth Iglesias similarly explores the importance of narratives and counternarratives that support nonmisogynistic heterosexuality and masculine identities. See Iglesias, *supra* note 246, at 991 ("[Proposed] counter-narratives offer alternative resources through which individual men and women may begin to construct the terms of a nonmisogynistic heterosexuality, that is, a heterosexuality in which male power does not depend upon female powerlessness and subordination.").

273. Peacemaking is sometimes described as a healing ceremony. See Interview with Raymond Austin, *supra* note 14; Interview with Philmer Bluehouse, *supra* note 15. Both processes may rely on "taking the person back" to an earlier time in his or her life. See Interview with Ruthie Alexis, *supra* note 12; Interview with Crownpoint Peacemakers, *supra* note 9. Farella discusses this "going back" function in rituals:

The ritual [of a treatment ceremony] takes us back to the beginning. The beings, who originated in the underworld, return . . . . The invocation and dramatization of the past bring the sense of connectedness of one's current experience through all time. The

## c. The Systemic Nature of Battering: Battering as a System of Control

Battering is systemic at the micro level: Battering involves a system of behaviors used to control, or to attempt to control, the victim. The abuser's battering behaviors are not limited to hitting but include emotional abuse and controlling behaviors that are frequently more deadening than the physical violence. The result may be a "state of siege" in which control, intimidation, threats of violence, and violence permeate every aspect of the woman's life.<sup>274</sup> Both the scope of Peacemaking's jurisdiction and its available remedies allow peacemakers to address battering behaviors that are nonviolent and noncriminal, such as economic coercion and control; name-calling and humiliating behavior, and influencing the children to coerce the woman.<sup>275</sup> To state a claim for Peacemaking, one must allege to be "injured, hurt or aggrieved by the actions of another."<sup>276</sup> Peacemaking agreements may include "rehabilitative" measures (e.g., alcohol treatment, counseling, and healing ceremonies) as well as "stay away" provisions.<sup>277</sup>

Anti-domestic violence advocates attempt to use formal law to reach nonviolent controlling behavior. In criminal law, traditional notions of criminality have been expanded to reach harmful, controlling, nonviolent behavior such as stalking.<sup>278</sup> Additionally, creative charging decisions and prosecutorial strategies are used to address some of the myriad ways in which a batterer dominates and limits the autonomy of a woman.<sup>279</sup>

Regardless of creative lawyering strategies and legislative drafting, however, the criminal law will remain a somewhat blunt instrument, able

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healer is working to create this experience on the part of the patient and her family, the sense that something tangible and therefore alterable is occurring.

FARELLA, *THE WIND IN A JAR*, *supra* note 262, at 130-31. Batterer's treatment programs may serve similar functions. See, e.g., DUTTON, *supra* note 214, at 164; EDLESON & TOLMAN, *supra* note 250, at 97-98.

274. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 *HOFSTRA L. REV.* 1191, 1208 (1993) (citing a conversation with Sue Osthoff, Director, National Clearinghouse for the Defense of Battered Women (Jan. 2, 1991)).

275. See PENCE & PAYMAR, *supra* note 184, at 3 (describing nonviolent tactics of control); Braithwaite & Daly, *supra* note 1, at 199-201 (suggesting possible remedies in community conferencing that improve the victim's position, including restructuring finances, regular family monitoring, or requiring the batterer to move out of the family home).

276. See PEACEMAKER CT. R. 3.2, in ZION & MCCABE, *supra* note 56, at 105.

277. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

278. See, e.g., ALA. CODE § 13A-6-90 (1994) (creating a crime of stalking for intentionally and repeatedly following someone and making an implied or expressed threat).

279. See Mahoney, *supra* note 37, at 84 (describing the use of creative charging to enhance a victim's safety); Zion & Yazzie, *supra* note 5, at 80-81.

only to reach a portion of the behavior that constitutes battering.<sup>280</sup> It will not reach the myriad controlling behaviors of a battering system.<sup>281</sup> "Law especially emphasizes acts of physical violence, and this emphasis in turn hides broader patterns of social power, [including] patterns of power within a given relationship . . . ."<sup>282</sup>

By comparison, civil protection orders in domestic violence cases are better able to forbid some nonviolent controlling behavior. The petitioner's burden of proof is more easily reached than that required of a criminal prosecution,<sup>283</sup> and, once the protection order is granted, behaviors that would otherwise be legal are subject to criminal sanctions.<sup>284</sup>

## 2. Peacemaking May Transform Context and Foster Personal and Social Change Through the Use of Traditional Navajo Stories

Peacemakers rely on traditional Navajo narratives to resolve problems brought to Peacemaking. Peacemakers may tell stories in their lectures to the parties, or they may refer to a character or a concept central to a story in order to illustrate a point or teach a lesson.<sup>285</sup> In this part I describe the

280. The reform effort's answer to this has been to send batterers to treatment programs that, in the main, address a range of controlling behaviors, behaviors that far exceed those that are criminalized. See, e.g., Dakis & Lazarus, *supra* note 206, at 46; Judge Linda Dakis, *Injunctions for Protection*, 68 FLA. B.J. 48, 50 (1994).

281. This is why criminology and general debates on crime control are both helpful and unhelpful when it comes to addressing domestic violence. They are not helpful if they fail to address the importance of underlying beliefs in a way that recognizes that offenders (batterers) are likely to hold relevant beliefs that are not that different from the majority. This is particularly true with subordinating crimes: crimes that are aimed at particular groups (race, gender, ethnicity) and in which the victims are targeted because of who they are.

282. Mahoney, *supra* note 37, at 60.

283. For example, protection order statutes allow for protection orders on grounds that might not support a criminal charge, including, a "reasonable cause to believe [the petitioner] may become the victim of any act of domestic violence." FLA. STAT. ANN. § 741.30 (West 1997) (domestic violence injunction). Of course, the petitioner's evidentiary burden in a civil protection order proceeding is easier than the "beyond a reasonable doubt" required of the state in a criminal proceeding.

284. See, e.g., NATION CODE tit. 9, § 1660-63 (Equity 1995) (stating that the relief available through a protection order includes an order granting exclusive possession of the residence; an order to "stay away" from the petitioner's, the family's, or the clan member's residence, place of work, or school; an order restraining the respondent from having any contact with the petitioner including in person, in writing, by phone, or through other means; and an order to attend substance abuse counseling or domestic abuse counseling; and further specifying that failure to adhere to the court's orders is the offense of "interfering with judicial proceedings" and that a violating respondent is subject to immediate arrest and, if found guilty, may be imprisoned for 180 days and fined \$250).

285. See Zion & Yazzie, *supra* note 5, at 77 (stating that the *naat'aanii's* lecture to the parties "often relates Navajo creation scripture through its many examples and maxims of the right way to do things"); see also Zion, *supra* note 150, at 24 ("A *naat'aanii*-peacemaker knows the traditional Navajo values and will most often express them by relating what happened in creation times to the problem at hand.").

use of traditional Navajo stories that embody gender-egalitarian themes. These stories offer the potential to describe Navajo masculinity in ways that support gender-egalitarian relations. Thus, the use of these stories may transform the way in which the batterer and his family understand his battering behavior.<sup>286</sup>

Gender complementariness in traditional Navajo thinking is the paradigm for understanding the interdependence of all creation.<sup>287</sup> Navajo creation stories and journey narratives underscore the importance of harmony, particularly gender harmony,<sup>288</sup> and may support a gender-egalitarian view.<sup>289</sup> For example, the story of the response of Changing Woman, “a central mythological figure,”<sup>290</sup> to Sun’s marriage proposal, underscores gender complementariness in which women’s needs and demands are understood to be as important as those of men.<sup>291</sup> Changing Woman gave birth to two sons, Born for Water and Monster Slayer, who were responsible for ridding the earth of monsters that were killing the people.<sup>292</sup> When the monsters were vanquished, Sun, father of the twins, came to ask her to move away with him.

286. Zion writes that Peacemaking moves participants from “head thinking” to “heart thinking.” See Zion, *supra* note 150, at 24. The offender is less likely to reject teachings of family and a peacemaker than of an authority figure such as a judge. See *id.* at 22–23. In Peacemaking, he “learns the inaccuracy of [his] . . . excuse[s] [for his behavior] and begins to change attitudes toward others.” *Id.* at 24.

287. See Bonvillain, *supra* note 58, at 10; Zion & Zion, *supra* note 21, at 413.

288. See, e.g., Bonvillain, *supra* note 58, at 10 (noting that this “[b]alance in gender relations is expressed symbolically in the female/male pairing of ritual elements, including west/east, red/blue, earth/sun, and blood/water”).

289. Peacemakers told me that they frequently use traditional stories. See Interview with Ruthie Alexis, *supra* note 12; Interview with Crownpoint Peacemakers, *supra* note 9. The peacemakers’ notes in the files I reviewed were generally too limited to verify the degree to which traditional Navajo stories were used by peacemakers. Some Peacemaking files noted that the peacemaker “counseled the [couple/family/children] on the responsibilities of [husband/wife/child].” Shiprock File Review, *supra* note 9.

290. Bonvillain, *supra* note 58, at 9.

291. “[Changing Woman] is the nurturer, the giver, the provider. One feels primarily warmth, trust, and safety in her presence, and the earth-surface dweller is always in her presence.” FARELLA, THE MAIN STALK, *supra* note 262, at 63. The Navajo word for mother may also include Changing Woman, “a central mythological figure, who came to the Navajo, it is said, when people had lost the ability to reproduce. The first female puberty rite was held for her, celebrating her fertility and enabling her to mate with the Sun.” Bonvillain, *supra* note 58, at 9. Changing Woman’s importance is expressed in the continued vitality of the puberty rite *Kinaaldá*, a ceremony for girls’ first menstrual period. *Kinaaldá* “expresses the values of womanhood and assures a good life for the adolescent girl.” LAMPHERE, *supra* note 58, at 157–58. The *Kinaaldá* ceremony is designed to create a positive self-image in young girls. See Shepardson, *supra* note 58, at 164.

292. See 1 NAVAJO HISTORY 50 (Ethelou Yazzie ed., 1971); PAUL G. ZOLBROD, DINE’ BAHANE: THE NAVAJO CREATION STORY 182–278 (1984). The monsters were born as a result of women’s “abusing themselves” with cacti, rocks, and other instruments during the years of living separately. The men “abused themselves” as well, but no monsters were born as a result. See FARELLA, THE MAIN STALK, *supra* note 262, at 53–54.

[O]n the morning of the fifth day *Asdzáá nádleeheé* the Changing Woman made her way to the summit of *Ch'óol't'í* the Giant Spruce Mountain and sat down on a rock.

....

And as she sat there recollecting, *Jóhonaa'éí* the Sun arrived and placed himself beside her.

He sought to embrace her.

But she struggled to free herself.

As she did so she said these words to him:

"What do you mean by molesting me so?" she said to him.

"I want no part of you!"

To which he gave her this reply:

"I mean simply that I want you for my own," he replied.

"I mean that I want you to come to the west and make a home for me there."

"But I wish to do no such thing," replied she.

"By what right do you make such a request of me?"

....

[Sun replied,] "When our son *Naayéé' neizghání* the Monster Slayer last visited me, he promised you to me."

....

[Changing Woman said to him:]

"What do I care for promises made by someone else in my behalf? I make my own promises or else there are no promises to be made. I speak for myself or else I am not spoken for. I alone decide what I shall do or else I do nothing."

....

[Sun continued to insist that Changing Woman join him. Changing Woman spoke.] And this is what she said to him at last:

"You have a beautiful house in the east I am told," she said to him.

"I want just such a house in the west.

"I want it built floating on the shimmering water, away from the shore, so that when the Earth-Surface people multiply they will not bother me with their quarrels.

"And I want all sorts of gems.

"I want white shell. I want blue shell. I want turquoise. I want haliotis. I want soapstone, agate, redstone, jet.

"Such things I want planted around my house so that I may enjoy their beauty."

....

[This is how Sun replied:]

"What do you mean by making such demands of me?" he replied.

"Why should I provide you with all of those things?"

This time she answered him quickly. And this is what she said to him:

"I will tell you why," she said to him.

"You are male and I am female.

"You are of the sky and I am of the earth.

"You are constant in your brightness, but I must change with the seasons.

"You move constantly at the very edge of heaven, while I must remain fixed in one place.

"Remember that I willingly let you send your rays into my body. Remember that I gave birth to your son, enduring pain to bring him into the world. Remember that I gave that child growth and protected him from harm. Remember that I taught him to serve his people unselfishly so that he would willingly fight the Alien Monsters.

"Remember, as different as we are, you and I, we are of one spirit. As dissimilar as we are, you and I, we are of equal worth. As unlike as you and I are, there must always be solidarity between the two of us. Unlike each other as you and I are, there can be no harmony in the universe as long as there is no harmony between us.

"If there is to be such harmony, my requests must matter to you. My needs are as important to me as yours are to you. My whims count as much as yours do. My fidelity to you is measured by your loyalty to me. My response to your needs is to reflect the way you respond to mine. There is to be nothing more coming from me to you than there is from you to me. There is to be nothing less."

....

[S]lowly . . . [Sun] drew close to her.

Slowly and thoughtfully he placed his arm around her.

And this time she allowed him to do so.

Whereupon he promised her that all the things she wished for she would have. . . .

So it is that she agreed; they would go to a place in the west where they would dwell together in the solid harmony of kinship.<sup>293</sup>

Navajo stories such as "Changing Woman" have the power to act as antisubordination<sup>294</sup> stories, counterstories to the colonizer's story of male dominance

293. ZOLBROD, *supra* note 292, at 272–75. Zolbrod's research for his written version began with the work of Washington Matthews (1843–1905), whose book, *Navaho Legends*, provides one of the most complete early written accounts of Navajo creation stories. See *NAVAJO LEGENDS* (Washington Everson ed. & trans., 1994); ZOLBROD, *supra* note 292, at 5. Zolbrod used other translations and ethnographic accounts to verify and supplement Matthews's prose. See *id.* at 11–12, 18. In addition, Zolbrod interviewed several Navajo informants who recited portions of the story to him, and he studied the Navajo language. See *id.* at 12. Zolbrod's English translation attempts to "duplicate the parallel structure of the language a Navajo storyteller employs." *Id.* at 14.

294. Ruth Colker, in the context of federal constitutional equal protection doctrine, distinguishes between "anti-subordination" and "anti-differentiation." See Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 *YALE J.L. & FEMINISM* 213, 220–21 (1997). Colker argues that:

Courts should analyze equal protection cases from an anti-subordination perspective. Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This

over women, human dominance over the natural world, and European dominance over Indians.<sup>295</sup> American Indian battered women's advocates have recognized the power of similar narratives as an organizing principle for opposition to domestic violence.

We make no apology for believing and promoting the ideals that women battering is not an Indian tradition. . . . The ideals that women shall live free of violence, control their own lives, manage their own assets, and have a say over things which directly affect their lives are key elements of our program. If these ideals are in line with those of "white western feminism" then we say, "Welcome, our

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approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities. . . .

In contrast to the anti-differentiation approach, the anti-subordination perspective is a group-based perspective, in two ways. First, it focuses on society's role in creating subordination. Second, it focuses on the way in which this subordination affects, or has affected, groups of people.

Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-09 (1986) (footnotes omitted); see also Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 792 (1992) (arguing that First Amendment jurisprudence should recognize that hate speech silences the less powerful, that "[w]hen hate speech is employed with the purpose and effect of maintaining established systems of caste and subordination it violates [the] . . . core value [of full and equal citizenship]," and that "[h]ate speech often prevents its victims from exercising legal rights guaranteed by the Constitution and civil rights statutes"). See generally CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997).

295. See ALLEN, *supra* note 65, at 41-42. Allen argues that to create "the social transformation from [Native] egalitarian, gynocentric systems to [a] hierarchical, patriarchal system[] requires meeting four objectives." *Id.* at 41. The first is to replace the "primacy of female as creator" with "male-gendered creators." *Id.* The second is to destroy "tribal governing institutions" and their underlying philosophies. *Id.* The third

is accomplished when people are pushed off their lands, deprived of their economic livelihood, and forced to curtail or end altogether pursuits on which their ritual system, philosophy, and subsistence depend. Now dependent on white institutions for survival, tribal systems can ill afford gynocracy when patriarchy—that is, survival—requires male dominance.

*Id.* at 41-42. The fourth objective

requires that the clan structure be replaced . . . by the nuclear family. By this ploy, the women clan heads are replaced by elected male officials and the psychic net that is formed and maintained by the nature of nonauthoritarian gynocentricity grounded in respect for diversity of gods and people is thoroughly rent.

*Id.* at 42. The contradiction between traditional practices in which women are said to be respected and the reality of domestic violence are not unique to the Navajo, of course. As Native battered women's advocates write:

We liken our struggle caring for and protecting our mothers and sisters to our collective struggle to care for and preserve our land, the Big Turtle. We are, however, not blind to the contradiction between the ideology and the practice. Too many of our men who take on the battle to preserve our traditions, land, and language—who perform the ceremonies, who play the drums, who dance, or who carry the eagle feather—also batter and abuse their partners and children.

BALZER ET AL., *supra* note 95, at 9.

white sisters, for striving for the things which were once ours by birthright well before your 'forefathers' arrived on our shores."<sup>296</sup>

Of course, stories can "flip"<sup>297</sup> in meaning, having one meaning in one context to a particular set of listeners and quite a different meaning in another context with a different set of listeners. The interpretation of the Navajo creation story, "Where People Moved Opposite"<sup>298</sup> provides an example. "Where People Moved Opposite" tells the story of when men and women determine that they can no longer live together. After First Man and First Woman fight, First Man persuades the men to live on the other side of the

296. BALZER ET AL., *supra* note 95, at 7. Similarly, legal scholars have long recognized the value of stories as a means of countering stereotypes and opening up creative opportunities for compromise, and as a method of creating an understanding of domestic violence. See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 315 (1993) ("In conjunction with legal reform, education, and institutional change, . . . [narratives] can bring us closer to the day when sexuality is pleasure and play, not danger and degradation, for women and men."); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1847-48 (1994) [hereinafter Fajer, *Outsider Narratives*] (noting that stories may counter stereotypes created by the listener's "pre-understanding"); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 514 (1992); Deborah M. Kolb, *The Love for Three Oranges Or: What Did We Miss About Ms. Follett in the Library?*, 11 NEGOTIATION J. 339, 345 (1995) (asserting that stories open up creative opportunities for compromise); Margulies, *supra* note 40, at 1075 ("Stories are the best vehicle for illustrating the terror that survivors [of domestic violence] face."); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3, 366 (1995) (writing that the use of narratives in queer legal theory is important because they have a "special power . . . to elicit a sense of empathy with sexual minority equality claims"). Scholars such as Gerald López believe that problem solving of all types by all persons in all venues is often done through storytelling. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 39-41 (1992). In this part I refer to a related but different point: Stories sometimes have the ability to change cognition, to allow parties to "reinvent" themselves, as well as to gain empathy. See generally Fajer, *Outsider Narratives, supra, passim*. This is not the inevitable result of storytelling, of course. The impact of a story depends, among other things, on its content and context and its credibility to the listener.

297. I am indebted to Margaret Montoya for her suggestion that I investigate the way in which Navajo traditional stories may "flip" in meaning. In another context, Montoya argues that stories—albeit personal stories—have the "potential for challenging the dominant discourse" and "invent[ing], reform[ing] and refashion[ing] personal and collective identity." Margaret E. Montoya, *Mascaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 210 (1994). The Changing Woman and Sun story also has a negative meaning. Some versions relate First Woman's anger at Changing Woman's decision to leave home. Because Changing Woman took a husband without parental approval and because Changing Woman moves to Sun's residence rather than to her mother's, she has deprived her parents of the services of their son-in-law. See FARELLA, *THE MAIN STALK, supra* note 262, at 60.

298. Farella notes that "Where People Moved Opposite" is a better translation of the Navajo title of the story than the usual English translation, "Men Versus Women." See FARELLA, *THE WIND IN A JAR, supra* note 262, at 59.



river, away from the women. Though versions vary as to what started the fight between First Man and First Woman, many versions center on First Man's anger about First Woman's adultery.<sup>299</sup> The men are joined by the *nádleeh*, "who were no more female than they were male,"<sup>300</sup> and prosper materially because the *nádleeh* are able to do women's jobs.<sup>301</sup> After four years of living apart, the women's situation is desperate; they are starving and destitute.<sup>302</sup> The men, while doing well materially thanks to the *nádleeh*, are desperately lonely for the women's company.<sup>303</sup> Finally, the men and women reunite.<sup>304</sup> The story is sometimes understood to represent the necessary gender complementarity that underscores much of Navajo cosmology.

What brings men and women together, sexual desire and our general need for and incompleteness without the other, is also what drives us apart. But when they are apart, they become intensely desirous of each other. . . . [M]ales and females are together out of a very fundamental necessity. . . .

They get back together.<sup>305</sup>

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299. There are different versions of the cause of the fight that split First Man and First Woman apart, but they all center on jealousy and most refer to sexual jealousy. In some versions, the fight centers on the woman's adultery, while others focus on the lack of appreciation for the different but equally important roles played by men and women. Compare 1 NAVAJO HISTORY, *supra* note 292, at 28–30 (recounting that First Woman commits adultery and the men, stirred by First Man's anger and jealousy, elect to move to the other side of the river), with ZOLBROD, *supra* note 292, at 58–70 (stating that First Man and First Woman's fight over "who does the most work around here" and "who is most important" leads to First Man's decision to take the men and separate from the women). Farella notes that the story that begins with First Woman's adultery "is a man's version of the story. I could never get women to talk to me about it. . . . The published versions of the story are also all from men and translated by men." FARELLA, THE WIND IN A JAR, *supra* note 262, at 60 n.1. Farella relates the story this way:

First Woman commits adultery. First Man suspects that something is going on and he is worried; he can't sleep and he obsesses about his wife. . . . So he follows her and sees her meeting and having sex with her lover. When she returns they fight. . . . They argue about control, who is the strongest, and so on. And they decide that they don't need each other, that things would be better if they lived apart. . . .

What brings men and women together, sexual desire and our general need for and incompleteness without the other, is also what drives us apart. But when they are apart, they become intensely desirous of each other. . . .

They get back together. . . . They are ritually cleansed after their separation and, as with all ritual, a four-day period of sexual abstinence is prescribed. They of course don't, or can't, follow it. You can trust a religion with stories like this.

*Id.* at 60.

300. ZOLBROD, *supra* note 292, at 60.

301. *See id.* at 61.

302. *See id.* at 63.

303. *See id.*

304. *See id.* at 70; *see also* 1 NAVAJO HISTORY, *supra* note 292, at 30.

305. FARELLA, THE WIND IN A JAR, *supra* note 262, at 60.

Another understanding is that because "First Man . . . [introduced] sexual desire and, therefore, . . . jealousy and adultery" into the world, he is responsible for the problem that began "Moving Opposite."<sup>306</sup> Another version finds a rationale for distrusting women because First Woman introduced adultery and disharmony into the world.<sup>307</sup>

Just as stories may have different meanings, the understanding of "traditional" may be contested, or at least contested in particular circumstances.<sup>308</sup> For example, traditional conceptions of gender relations may mean a belief that the world is animated by male and female essences and that harmony requires a balance of the two.<sup>309</sup> It may mean a political order in which women have roughly equal, though not necessarily the same, power as do men.<sup>310</sup> Given the influence of Christianity in the Navajo Nation, it may mean Paul's admonition to the Ephesians: "Wives [should] be subject to [their] husbands, as to the Lord."<sup>311</sup> For example, one interviewee told of coming in late to a meeting of peacemakers who were discussing domestic violence cases. One of the women peacemakers stated that she believed that domestic violence was the result of too many women trying to act like men. She explained that a woman acted like a man when she took a man's

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306. FARELLA, *THE MAIN STALK*, *supra* note 262, at 54.

307. See Shepardson, *supra* note 58, at 172 ("When I asked a judge why so few women were elected to the Navajo Tribal Council, he referred to this [story of separation of the sexes]. That, he said, was why Navajo women could not be trusted in politics."); Zion & Zion, *supra* note 21, at 422 n.107 ("Navajo men often cite the separation of men and women over adultery in a prior world as evidence of the superiority of men.").

308. See Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13, 25-28 (1998). Nader's work describes the use of "harmony" ideology as pacification. Under conditions of colonization, Nader argues that Native American use of harmony concepts may be accommodation to Christian proselytizing and Euro-American colonization. See LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* 291 (1990) ("Harmony ideologies may be used to suppress peoples by socializing them toward conformity in colonial contexts, or they may be used to resist external control, as the Talean Zapotec do."). "Traditional" concepts may be deployed in a similar fashion. See Nader & Ou, *supra*, at 37 (describing the deployment of Indian "traditions" such as "idealizations of the Indian worldview, such as the web of life" in efforts of a power company and its Indian allies to aggressively market the building of a nuclear waste storage facility on Indian land).

309. See Bonvillain, *supra* note 58, at 10.

310. See Zion & Zion, *supra* note 21, at 412.

311. *Ephesians* 5:22 (New Revised Standard Version). Many Navajo people are Christians. See Interview with Tom Tso, former Chief Justice of the Navajo Supreme Court, in Crownpoint, Navajo Nation, N.M. (Apr. 20, 1997) (notes on file with author). Tso discussed his misgivings with Peacemaking's focus on traditional spiritual understandings because the many Navajo Christians might feel uncomfortable. Tso counseled for a process that was not specifically "spiritual," which, he believed, was more in keeping with traditional problem-solving methods of the Navajo. See *id.*

job and failed to have dinner on the table when the man got home from work.<sup>312</sup>

Despite the possibility of different interpretations of Changing Woman's story, the one of gender harmony is most common. This is so because "[t]he central theme [of the Navajo creation account] is the attainment of *hózhó*, a fairly untranslatable term which can only be approximated in English by combining words like *beauty*, *balance*, and *harmony*,"<sup>313</sup> and gender harmony is necessary for *hózhó*.

The pivotal element [in achieving *hózhó*] is the fundamental relationship between male and female, represented first by *Áxtsé hastiín* or First Man and *Áxtsé asdáá* or First Woman, and later by *Asdzáá nádleehé* or Changing Woman and *Jóhóna'ét* the Sun. The inability of the former two to get along causes evil by bringing about the generation of the *Naayéé'* or Alien Gods. The union of the latter couple represents the first step leading to the destruction of the evil monsters. But full harmony cannot be established until Changing Woman and the Sun achieve a fully equitable relationship; and not until then does the actual creation of the Navajo people occur. Everything that happens throughout the [creation] story relates directly or indirectly to the notion of delicate balance between male and female.<sup>314</sup>

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312. Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author). For a description of the various responses of American Indian women to Christian proselytizing and colonization, see generally Pauline Turner Strong, *Feminist Theory and the 'Invasion of the Heart' in North America*, 43 ETHNOHISTORY 683 (1996). Anti-domestic violence advocates working in the Pueblo tribe raise similar concerns regarding traditional Pueblo counseling. See, e.g., Sharon Pomeranz & William Johnson, *Stuck in the Middle with Mediation*, 1(1) PUEBLO DRUM: INDIAN PUEBLO LEGAL SERVICES, INC. NEWS. 4-5 (1997). Pomeranz and Johnson note that in traditional Pueblo mediation,

[o]ften times the incidents of violence are overlooked entirely by the neutral mediator. . . . Traditional [Pueblo] dispute resolution emphasizes family preservation and reunification but may block a women [sic] from making informed choices about what is right for her life. The reason why couples are asked to participate in mediation when family violence has occurred is so that the couple can work it out and stay together. . . . Families are precious, but violence should not be taken lightly. . . . Mediation does not offer a woman choices, control, advocacy, safety, or binding resolution.

*Id.* Similar concerns have been raised about sentencing circles. See discussion *supra* note 207 and source cited.

313. ZOLBROD, *supra* note 292, at 5.

314. *Id.* at 5-6; see also Zion & Zion, *supra* note 21, at 415 (describing *hózhó*). The necessity of balance between male and female essences in all things can be seen in the importance of symbolic colors in Navajo ceremonies: "White, a male color, stands for dawn; blue, a female color, stands for broad daylight; yellow, also female, is the evening twilight; and black, a male color, is the darkness of the night." ZOLBROD, *supra* note 292, at 347. Bluehouse explained in a community education presentation that I observed that *Hashkeeki Naat'ah* ("War Way") and *Hozhooji Naat'ah* ("Peace Way") must be in balance to create *Hozho Nahasdlíi* ("Harmony Restored"). See generally Bluehouse, *supra* note 152.

### 3. Peacemaking May Support “Safe Connection”<sup>315</sup> and Avoid Gender Essentialism

In this part, I argue that Peacemaking may evade two problems common to domestic violence reform institutions. First, Peacemaking does not treat as pathological women’s attempts to maintain relationships with men who have abused them and may offer support that enhances women’s safety in those relationships. Second, Peacemaking does not discount women’s various competing loyalties and thus does not demand that women choose their identity as “battered women” over other competing identities.

*Peacemaking and the Focus on Separation.* Legal professionals in domestic violence reform institutions—judges who routinely hear protection order or misdemeanor battering cases, court personnel hired specifically to work with battered women,<sup>316</sup> prosecutors, police officers, probation officers, and court clerks—frequently understand women’s unwillingness to cooperate with formal interventions that are the direct result of battering.<sup>317</sup> The narrative exists in three variants: The batterer is intimidating her; she is brainwashed by the batterer and believes that she deserves to be hit;<sup>318</sup> and she believes that she can change him, but she is wrong in that belief. The correct response to each of the variants is for her to leave him.<sup>319</sup> Martha Mahoney argues that this emphasis on separation results from a societal inability to recognize the coexistence of both strength and weakness, victimization and agency.<sup>320</sup> She argues that women’s struggles in the context of daily oppression are thus made invisible.<sup>321</sup>

315. The term is Littleton’s. See Littleton, *supra* note 177, at 52. Littleton asks, “What would legal doctrine and practice look like if it took seriously a mandate to make women safer in relationships, instead of offering separation as the *only* remedy for violence against women?” *Id.*

316. See Dakis & Lazarus, *supra* note 206, at 47–51 (describing a Miami-Dade County, Florida model in which court personnel assist both petitioners and respondents in civil protection order hearings). See generally Hart, *supra* note 233 (providing a detailed account of what battered women need from the criminal justice system).

317. Formal interventions include prosecution as well as civil protection orders.

318. Mahoney has described the manner in which images of battered women as extreme victims make it difficult for women to identify their own stories of victimization and struggle against that victimization. See Mahoney, *supra* note 49, at 25.

319. See *id.* at 6 (explaining that the battered woman’s “failure” to leave makes her claims of battering suspect or makes her seem “crazy”); see also Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1307 (1992) (“[W]hile . . . social historians have painted a complex world of oppression and resistance . . . law has not managed to incorporate this duality and struggle, pain and strength, but filters it to a sense of victimization.”); Schneider, *supra* note 55, at 557–58. This narrative is far less misogynist than the one it replaced, in which battered women were understood to be either liars or provocateurs and “deserved what they got.” It is still, however, an inaccurate account of women’s struggles.

320. See Mahoney, *supra* note 37, at 64.

321. See *id.*

The personal story of a Navajo domestic violence counselor illustrates Mahoney's point.<sup>322</sup> This counselor told me that she had "walked the talk" and could relate to what domestic violence victims go through. When her husband beat her, she called the police, but they would not do anything. One day she called the police and told them that all she wanted was for them to assist in escorting her husband to his mother's house. They agreed. When the police arrived, her husband asked if he could ride with her. She agreed that he could, as long as he did not "act out." The police followed her. During the course of the drive, her husband started "acting out," and she stopped the car and told police officers he had to ride with them because she was afraid he was going to hurt her. When they arrived at his mother's house, she told her mother-in-law: "[Y]ou're always blaming me and are always saying [his behavior is] my fault, but I'm giving the problem back to you and it's *your* problem." She and her husband were separated for two years. During that time, she returned to college and became financially independent. Her husband, meanwhile, began alcohol treatment. They are now reunited, and there has been no more violence. Stories like this one are simply not captured in a "staying versus leaving" calculus.

While sympathetic legal professionals in legal reform institutions are sensitive to the propensity to "blame the victim,"<sup>323</sup> their understanding of the lives of the women they see may be constrained by class or racial divides. This is particularly accentuated when those legal professionals are not involved in political and community work on battering, because their exposure to battered women is limited to brief encounters in the courtroom or hurried conversations before a hearing. With such limited contact, they may be unaware of the myriad ways in which women attempt to organize both formal and informal resources to foster more choices in their lives and to increase their safety.<sup>324</sup> Further, law-trained professionals tend to over-emphasize legal courses of action and often believe that women will be safer if they separate and if legal proceedings are initiated.<sup>325</sup> This tendency

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322. See Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author).

323. See generally WILLIAM RYAN, *BLAMING THE VICTIM* (1976).

324. See David A. Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 *LAW & SOC'Y REV.* 313, 314 (1991) (noting that women may desire to use prosecution as a power resource to negotiate more safety and more control in their lives); Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?*, *supra* note 178, at 214, 241; Miller & Krull, *supra* note 45, at 243-44.

325. See Hart, *supra* note 233, at 100 ("Criminal justice system personnel too often believe that battered women will be safer and less exposed to life-jeopardizing violence once they are separated from the offenders and once prosecution has commenced.").

results in an overemphasis on legal reform and an underemphasis on other efforts for social change.

When a woman with a restraining order is killed or harmed by an abuser, it is not uncommon to hear, "She did everything right, but . . ." She did everything *right*? The work to create a coordinated system response can so easily translate into a system that requires "good" battered women to use every aspect of that coordinated system. Similarly, when women with temporary domestic violence protection orders do not return for permanent orders, the assumption is that nonreturn means that the system failed.<sup>326</sup> Research demonstrates the contrary: Some women reunite with battering partners and experience no further violence, and other women exchange dropping the order for important concessions from the batterer in areas such as custody and support.<sup>327</sup> In other words, for some women a temporary order marks success, not failure.<sup>328</sup> Informed by the societal inclination to believe victimization and agency to be diametrically opposed categories, overconfidence in the superiority of legal processes combines with overconfidence that separation enhances a woman's safety. The result is a simple calculus: Separation is "good," and staying or reuniting is "bad."

*Loyalty Traps*<sup>329</sup> and *Gender Essentialism*. Angela Harris criticizes feminist legal theory for its frequent reliance on a gender essentialism that requires that women presume an undifferentiated single identity: "woman."<sup>330</sup> Legal institutions designed to help battered women may similarly require that they adopt a singular essentialist identity: "battered woman."<sup>331</sup> This identity requires that the woman prioritize the domestic abuse, even if she is suffering other (and potentially worse) violence or abuse in other

326. See Telephone Interview with Linda Dakis, former Chief Administrative Judge of the Dade County Domestic Violence Court (Oct. 1996) (notes on file with author).

327. See Harrell & Smith, *supra* note 324, at 219–21 (describing the reasons that the women in the study gave for dropping the protection order).

328. See Ford, *supra* note 324, at 320–21; Harrell & Smith, *supra* note 324, at 218.

329. Paraphrasing from Beth Richie, *Battered Black Women: A Challenge for the Black Community*, BLACK SCHOLAR, March/April 1985, at 40, 41.

330. See Harris, *supra* note 39, at 585. Harris notes elsewhere that the use of a "race" identity is primarily about "a certain set of political and moral rights and obligations that are argued to arise from a certain history. . . . Claiming a nonwhite racial identity in this anti-racist context is to make a moral demand on whites to recognize and redress the injuries caused by white supremacy." Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 212 (1996). I argue similarly that enhancing battered women's autonomy means, among other things, not pathologizing the political, social, and familial identities that women use, sometimes strategically and sometimes as an expression of personal identity.

331. See, e.g., BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 87–89 (1989); Mahoney, *supra* note 49, at 25 (describing the manner in which extreme images of battered women prevent women from identifying as battered); Schneider, *supra* note 55, at 530–31.

locations.<sup>332</sup> The emphasis on separation coupled with this insistence on prioritizing battering results in defining as pathological her loyalties to anything other than her children and her own safety.<sup>333</sup> Women who desire to remain connected<sup>334</sup> to their abusive partners may receive diminished support.<sup>335</sup>

332. See, e.g., BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 124–25 (1984).

[M]any black women feel they must confront a degree of abuse wherever they turn in this society. . . . Black women in professional positions . . . are often the targets of abuse by employers and co-workers who resent their presence. Black women who work in service jobs are daily bombarded with belittling, degrading comments and gestures on the part of the people who have power over them. The vast majority of poor black women in this society find they are continually subjected to abuse in public agencies, stores, etc. These women often feel that abuse will be an element in most of their personal interactions. They are more inclined to accept abuse in situations where there are some rewards or benefits, where abuse is not the sole characteristic of the interaction. Since this is usually the case in situations where male violence occurs, they may be reluctant, even unwilling to end these relationships. Like other groups of women, they fear the loss of care.

*Id.*; SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 235 (1982) (“[B]ecause poor people experience so many different kinds of oppression, violence may be responded to as one of many abuses.”); Crenshaw, *supra* note 39, at 1245–46.

333. And safety means separation. While safety is emphasized in the domestic violence legal interventions such as protection orders and arrest policies, it is often ignored in other justice settings. For example, the trend in custody adjudication to emphasize the importance of the child's relationship with both parents tends to punish the woman who desires separation. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making*, 101 HARV. L. REV. 727, 765–66 (1988); Grillo, *supra* note 26, at 1570–71. This results in a strong push for joint parenting plans. See Fineman, *supra*, at 734. A battered woman who wishes to minimize an abusive father's access to his children is labeled a “parental alienator,” and her desire to “disconnect” is rendered pathological. See interview with Jennifer, in Miami-Dade County, Fla. (Sept. 9, 1998) (notes on file with author) (describing the differences she and other women experience between specialized domestic violence court, where the battering is treated as real and important, and in family court custody adjudication, where women's stories of abuse are often presumed to be nothing but strategy moves).

334. See Littleton, *supra* note 177, at 52–56 (describing the need to assist women with making “safe connection”). Staying connected does not necessarily mean being reunited—it may mean rebuilding a relationship with his family. It may mean a safe place in which to talk to him about the harm he has done to her. There is unlikely to be a mechanism for safe discussion in the reform model programs unless it happens through supervised child visitation, a rare event that is totally dependent on a finding unrelated to the woman's desire to talk with the abuser. See Debra A. Clement, *A Compelling Need for Mandated Use of Supervised Visitation Programs*, 36 FAM. & CONCILIATION CTS. REV. 294, 294 (1998) (describing supervisory visitation centers). See *infra* Part II.A for a discussion of why family court mediation does not provide a mechanism for safe discussion.

335. This is evidenced both in formal and informal practice. For example, though restraining orders as a matter of law should remain unaffected by a woman's willingness to reunite with an abuser, police routinely refuse to enforce them if there is evidence that “she let him back in,” and some courts actively discourage women from repeated restraining order filings. The most caring judges may believe that when a woman does not appear at permanent restraining order hearings, the system has failed her. This derives, in part, from a common myopic view that fails to account for the woman's use of other resources in her life—family, church, friends—that may render a final restraining order an unnecessary embarrassment or a hassle. It also fails to account for the women for whom a temporary order provides the bargaining power needed to secure concessions from the abuser. It presumes that the woman has reunited with the batterer and further presumes that doing

In turn, this gender essentialism and focus on separation may exacerbate a sense of conflicting loyalties that some battered women feel.<sup>336</sup> Conflicts of loyalty may be most acute for women of color and poor women who experience subordination on the basis of race, ethnic identity, language, immigrant status, or economic status.<sup>337</sup> The conflict may be multifaceted. First, the group-based/identity conflict is a result of the refusal of group politics both to acknowledge sexist practices within the group and, similarly, to discourage exposing such practices to the hostile outside community.<sup>338</sup> The group refusal has real consequences in a woman's life. The group may withdraw support if she fails to keep knowledge of battering inside the group.<sup>339</sup> She may feel that she can neither live without safety nor live without community.<sup>340</sup> Helping institutions that operate with racist patronizing attitudes, shelters that are simply ignorant regarding cultural norms (e.g., food, clothing, and child-care norms),<sup>341</sup> and police and justice system actors who

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so will result in further battering. See generally BOWKER, *supra* note 200, *passim* (interviewing women who solved their domestic violence problems—including some who reunited with their former abuser).

336. See, e.g., RICHIE, *supra* note 259, at 61–62.

337. See *id.*; Crenshaw, *supra* note 39, at 1252; Rivera, *The Violence Against Women Act*, *supra* note 40, at 468–74. Linda Mills's work is similarly concerned with the manner in which "dogmatic approaches [that emphasize separation and criminal justice intervention] are completely unresponsive to battered women who are incapable of leaving because of internal or cultural pressures." Linda Mills, *Empowering Battered Women Transnationally: The Case for Postmodern Interventions*, 41 SOC. WORK 261, 263 (1996). See generally Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183 (1997); Linda G. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence*, 25 CRIM. JUST. & BEHAV. 306 (1998); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996). Though my focus here is on heterosexual relationships, it is important to note that lesbian battered women face a different set of loyalty conflicts. See, e.g., Arlene Istar, *The Healing Comes Slowly*, in NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 163 (Kerry Lobel ed., 1986); Mahoney, *Victimization or Oppression?*, *supra* note 49, at 50.

338. See Crenshaw, *supra* note 39, at 1253, 1256–57; Richie, *supra* note 329, at 41; Rimonte, *supra* note 40, at 1313–15. Gloria Valencia-Weber and Christine Zuni explain the necessity of understanding identity as involving both race and gender: "We believe that the unique status of American Indian women as members of sovereign tribal nations cannot be separated completely from their experiences, positive and negative, as females. Further, issues affecting tribal women cannot be analyzed in isolation from the extraconstitutional doctrines of tribal sovereignty." Valencia-Weber & Zuni, *supra* note 50, at 92 n.114.

339. See Hart, *supra* note 233, at 103 (noting that women who find that the best protection against the perpetrators' violence is the protection offered by the community with which they affiliate may resist prosecution if they conclude that the community will abandon them or withdraw critical support if they pursue prosecution).

340. Virginia Coto, director of Lucha, a program of the Florida Immigrant Advocacy Center that assists battered immigrant women, notes that the support found within the program is vitally important because many women have left all other means of support. See Interview with Virginia Coto, Director of Lucha, at Miami, Fla. (Feb. 4, 1999) (notes on file with author).

341. See Soraya M. Coley & Joyce O. Beckett, *Black Battered Women: Practice Issues*, 69 J. SOC. CASEWORK 483 (1988) (describing the way in which shelters for battered women may fail to



treat victims and perpetrators with racist hostility all reinforce the message of betrayal.

Related to this conflict may be the woman's awareness of the multiple oppressive structures operating in her partner's life.<sup>342</sup> Institutional power that operates in racist and colonial ways towards men of color deepens the conflict. Women whose partners are working class, poor, or men of color may fear that their partners fit too well the stereotype of a batterer.<sup>343</sup> Additionally, women may feel conflict between their ethnic or political identities and inviting state intervention into their private lives.<sup>344</sup>

Thus, a conflict of loyalty may be understood in political terms—you do not turn over a brother to occupying authorities—or in deeply individual terms—the instinct that further mistreatment at the hands of the criminal justice system will not engender compassion or empathy in a man who has been horribly mistreated by his father.<sup>345</sup> A woman may simultaneously

meet the needs of African American women); Crenshaw, *supra* note 39, at 1262–65 (describing the same for women of color).

342. See Richie, *supra* note 329, at 40–43 (describing a group called “Battered Minority Women” (BMW), who blamed battering exclusively on white supremacy). Unlike BMW, I do not argue that battering men have no responsibility for their abuse. Quite the contrary, I argue that they make choices for which they are responsible, but recognition of that responsibility does not foreclose recognition of the oppression in their lives and its relevance to those choices. See discussion *supra* Part I.C.1.b.

343. Women may decide not to seek help from authorities they fear will mistreat their partners because of race or class bias. See Janice Joseph, *Woman Battering: Comparative Analysis of Black and White Women*, in *OUT OF DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE*, *supra* note 45, at 161, 162 (“[A]frican American women are hesitant to call the police even if there is extreme violence, for fear of how the Black batterer will be treated by the police.”). See generally HILDEN, *supra* note 60, at 160 (arguing that America’s “popular culture industry” privileges those stereotypes of Indian males that embody “the most aggressive, ‘macho’ aspects of American masculinity”); Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1071 (describing the way in which racist stereotypes of African American women shape the way in which juries understand their accounts of battering).

344. See Rivera, *The Violence Against Women Act*, *supra* note 40, at 505 (arguing that mandatory arrest policies are “philosophically in opposition to feminist and civil rights doctrines . . . founded on notions of individual and community empowerment and community-based control”); Valencia-Weber & Zuni, *supra* note 50, at 87 (suggesting that Peacemaking comports well with Indian women’s value systems). Zuni notes that Peacemaking is an essentially spiritual process, and she suggests that this spiritual nature is particularly important to Navajo women. See Conversation with Christine Zuni, Professor, University of New Mexico School of Law, in Albuquerque, N.M. (March 1998) (notes on file with author) (commenting on a presentation I gave to the University of New Mexico law faculty). Similarly, Hart notes that a small number of battered women “oppose prosecution for political reasons, believing that the criminal justice system selectively penalizes men of color or other politically unpopular constituencies.” Hart, *supra* note 233, at 103.

345. See Harris, *supra* note 48, at 43 (arguing that the common practice of “[s]eeing criminal justice as warfare assumes that violence can be—indeed, must be—overcome by more violence, rather than by compassion and love”); Hart, *supra* note 233, at 103 (“Some [battered women] believe that the exposure of batterers to the criminal justice system and its coercive controls will

believe in her “right to not be beaten”<sup>346</sup> and desire to stop her partner’s (or ex-partner’s) self-destructive behavior.

Peacemaking’s willingness to value relationships may offer an alternative to the problems of gender essentialism and loyalty traps.<sup>347</sup> Peacemakers in Crownpoint frequently encourage parties to agree to a separation for a period from sixty to ninety days, during which time the battering husband agrees to attend counseling and refrain from contacting the woman.<sup>348</sup> This allows the wife time to judge the seriousness of his intentions for reform.

Battered women appear to petition for Peacemaking in significant numbers.<sup>349</sup> Many of these women see Peacemaking as a last effort to save the marriage.<sup>350</sup> Some women conclude that the marriage cannot be saved and either return to family court or seek the peacemaker’s assistance with a divorce.<sup>351</sup> The value Peacemaking places on relationships does not prevent divorce,<sup>352</sup> but it does allow women to feel that they have explored all avenues for help, even if their partner simply will not change his behavior.<sup>353</sup>

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facilitate, rather than deter, future violence.”); see also *supra* note 250 and accompanying text (reporting that significant numbers of identified batterers report a history of child abuse).

346. See generally LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988) (documenting the manner in which battered women developed and articulated a “right to not be beaten”).

347. I do not mean to diminish the possibility that Peacemaking may so value relationships as to punish battered women who desire separation. See *infra* notes 455–463 and accompanying text (discussing the possibility of an antidivorce bias in Peacemaking).

348. See Interview with Crownpoint Peacemakers, *supra* note 9. Conditions during the separation generally include counseling for the man and sometimes for the woman as well. See *id.* Some peacemakers encourage parties to develop detailed agreements of the kind encouraged by battered women’s activists for protection orders (e.g., child visitation exchange agreements, support agreements, and stay-away provisions). See *id.* It may be that some peacemakers falsely believe, as do others, that separation ensures safety. In fact, most female intimate homicide victims are separated at the time of the killing. See Coker, *supra* note 182, at 87.

349. Of the 12 self-referred cases involving domestic violence whose files I reviewed, six were originated by women. In three of the remaining six, I was unable to discern who the petitioner was, but the case did not appear to be court-ordered because there were none of the usual court documents in the file. Only three were clearly originated by men. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

350. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

351. Others go to Peacemaking knowing they desire a divorce and wanting the peacemaker’s help in reconciling issues related to the divorce. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

352. Some battered women’s advocates in the Navajo Nation expressed concern that peacemakers are antidivorce. The evidence from the Peacemaking files I reviewed is mixed. Some peacemakers do appear to have an antidivorce (or a promarriage) bias, while others do not. See discussion *infra* notes 455–463 and accompanying text. However, the overall point is important: Many women feel free to pursue divorce and find Peacemaking helpful either in negotiating divorce-related issues or in ensuring that divorce is their best option.

353. See *supra* note 216 (describing an example of such a reaction); see also Shiprock File Review, *supra* note 9.

## II. PEACEMAKING AND THE PROBLEMS OF INFORMAL ADJUDICATION

In this part, I discuss problems for battered women in informal adjudication contexts. Though I collectively refer to these processes as “informal adjudication,” there are important distinctions to be made between them. I include civil court mediation, which most frequently deals with child custody and visitation issues,<sup>354</sup> as well as restorative justice programs, which deal with criminal charges.<sup>355</sup> Restorative justice programs include victim-offender mediation,<sup>356</sup> family group conferencing<sup>357</sup> (or community conferencing),<sup>358</sup> and sentencing circles.<sup>359</sup> Restorative justice theory understands crime as first and foremost “a conflict between individuals. The person who was violated is the primary victim, and the state is a secondary victim.”<sup>360</sup> The purpose of restorative justice is not to punish the offender, but rather to engage the offender in whatever measures are required to restore the victim.<sup>361</sup> There are problems for battered women that are common to all of the

354. See Fineman, *supra* note 333, at 731–32.

355. See generally MARK UMBREIT, *CRIME AND RECONCILIATION: CREATIVE OPTIONS FOR VICTIMS AND OFFENDERS* (1985) [hereinafter UMBREIT, *CRIME AND RECONCILIATION*]; MARK S. UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994) [hereinafter UMBREIT, *VICTIM MEETS OFFENDER*]; Stuart, *supra* note 208.

356. See generally UMBREIT, *CRIME AND RECONCILIATION*, *supra* note 355; UMBREIT, *VICTIM MEETS OFFENDER*, *supra* note 355.

357. See Mark Umbreit & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, FED. PROBATION, Sept. 1996, at 24.

358. Braithwaite and Daly prefer the term “community conferencing” in order to denote that the important criterion for inclusion is not blood relationship to one of the parties but rather some strong relationship with one of the parties. See Braithwaite & Daly, *supra* note 1, at 195 (noting that “communities of concern” are gathered for community group conferencing).

359. Sentencing circles are similar to Peacemaking and are used in Canada with First Nations offenders. See generally Goel, *supra* note 2; Stuart, *supra* note 208.

360. UMBREIT, *VICTIM MEETS OFFENDER*, *supra* note 355, at 2.

361. The results are processes that are not punitive, though they may require action on the part of the offender. They are not retributive, because rather than focusing on what the defendant deserves, they focus on what is required to make things right for the victim. See Umbreit, *supra* note 6, at 203–04; see also McCold, *supra* note 55, at 86–87. McCold notes that

[t]he loss of control and orderliness experienced is often more damaging than any physical or material loss suffered. [Therefore, restorative justice processes should] bring meaning to the crime event in order to restore predictability and order in their lives. They need vindication that what happened to them was wrong and undeserved, and opportunities to express and have validated their anger and pain. Victims need to be restored to a sense of control and safety in their lives.

*Id.* at 87 (emphasis added). In part, restorative justice measures have gained a limited momentum in the United States because of the hegemony of the “new penology” described by Malcolm Feeley and Jonathan Simon. See, e.g., Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL’Y & L. 452, 454–55 (1998) (describing the transformation of penology from an individual rehabilitative focus to one of risk management on the part of profes-

informal processes, as well as problems that are primarily true of either mediation or restorative justice processes.

Family court mediation's focus on the future does not adequately address the harms of violence and often results in "domesticating"<sup>362</sup> stories of violence so that they become stories of conflict.<sup>363</sup> The tie of restorative justice processes to criminal adjudication generally means the process is more directly focused on the violent behavior of the batterer than is true of family court mediation. However, many restorative justice programs presume a one-time victimization, rather than the ongoing victimization that characterizes battering.<sup>364</sup> The presumptions regarding a victim's needs, therefore, fail to account for relationship-centered victimization in which the offender repeatedly blames the victim for her victimization.<sup>365</sup>

This part examines Peacemaking in light of these informal justice problems. I group the problems with the use of informal adjudication for battered women into four types: the coercion problem, the cheap-justice problem, the normative problem, and the communitarian, social-change problem.

#### A. The Coercion Problem

The coercion problem has two different and equally important aspects: coercion in the process and coercion through forcing victim participation. Coercion in the process results from the ability of the batterer to intimidate the woman or to wrest control of the mediation. The batterer's use of methods of intimidation, subtle or not, may continue his controlling behavior

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sional institutional actors and "populist punitiveness" on the part of legislators). See generally Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Correction and Its Implications*, 30 *CRIMINOLOGY* 449 (1992).

362. Cobb, *supra* note 54, at 400, 436–37.

363. See Fischer et al., *supra* note 26, at 2158. Further, the focus of mediation in custody determinations is often the primacy of the parent-child relationship, particularly the relationship with the noncustodial parent, rather than the battered woman's safety. See Fineman, *supra* note 333, at 769; Hart, *supra* note 26, at 326. Unlike most other informal adjudicative processes, the originators of Navajo Peacemaking have, from its inception, conceived of it as an intervention in domestic violence cases.

364. For example, McCold's understanding that victims need to restore "orderliness," and Umbreit's understanding that victims need to understand "why me?" from their encounters in victim-offender mediation, fail to deal with the nature of ongoing intimate abuse. See McCold, *supra* note 55, at 87; Umbreit, *supra* note 6, at 203–04. Batterers are adept at repeatedly explaining "why you" as they routinely tell their victims that it is the victims' fault they behave as they do. See Adams, *supra* note 32, at 186. Further, unless there is a change in relative power between the parties, the woman's victimization will likely continue either because of the batterer's ongoing manipulation and control or because the devastating emotional and economic consequences of abuse are long lasting.

365. See *supra* notes 206–210 and accompanying text.

through the mediation process and result in an unfair agreement.<sup>366</sup> This concern is underscored by the recognition that battering is not a one-time incident but rather a controlling system of behaviors that constrains the victim's autonomy.<sup>367</sup> Behaviors become symbols for past incidents of abuse and serve to intimidate the woman: the way he rubs his forehead when he is really angry or the flinty look in his eyes.<sup>368</sup> Battered women in mediation may find themselves negotiating for their safety. Battering relationships are frequently marked by a history of such negotiations, prompted by the victim blaming rules of the batterer: "I won't hit you if you'll have dinner ready on time; I won't hit you if you're always sexually available; I won't hit you if you keep the children from making a mess."<sup>369</sup>

366. See, e.g., Fischer et al., *supra* note 26, at 2158 (noting that any agreement will mirror the rules of battering: the batterer makes and enforces the rules that the battered woman must obey or be punished); Hooper & Busch, *supra* note 2, at 105-06 (noting that in both victim-offender mediation and family group counseling, battered women cannot negotiate freely and fairly with an abuser, and that the batterer's "pattern of dispute resolution is characterized by coercion and intimidation").

367. See Fischer et al., *supra* note 26, at 2128 ("[V]iolence does not need to be a constant presence for the victims to feel threatened that it could erupt at any point . . ."). Many battered women live in a "state of siege" where the abuse and the threat of further abuse is chronic and where the batterer exerts control over the everyday life of his partner and family. See Dutton, *supra* note 274, at 1208.

368. See Fischer et al., *supra* note 26, at 2120 ("A gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse."). Particularly in custody mediation, a woman may be likely to make unfair agreements in order to maintain some control over the batterer's access to the children or in the hopes of maintaining an uneasy truce. See Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse Is Charged*, JUDGES' J., Spring 1988, at 13; Hart, *supra* note 26. Hart describes the experience of a battered woman in custody mediation:

"I thought it was bad when I was married. I was always tiptoeing around trying not to get beaten; trying to keep my husband focused on me, so he wouldn't hurt my son . . . I guess you could say that I was terrified, but I was too numb to even realize it. I don't know where I found the courage to leave. By the time I did, I was on disability because of neurological problems—coming directly from the beatings.

Anyway, as soon as I left he filed for custody of our son. I had to go to mediation. They told me I had to cooperate; we had to work out an agreement in mediation. If I didn't cooperate I would lose my son because I couldn't afford an attorney to go to court.

I don't remember much of what happened there. I felt like I had no choice. The mediator and my husband actually worked out the agreement. I signed it. They tell me I agreed and that I'm stuck with it.

You know, in some ways I'm even less able to control my own life now. What I mean is, I can't do anything about my son without his approval."

Hart, *supra* note 26, at 321 (quoting a battered woman interviewed by Hart in Arizona in 1989).

369. See, e.g., Fischer et al., *supra* note 26, at 2159 (arguing that "any agreement that is structured in the format of 'Mr. Abuser agrees to stop the abuse and Ms. Victim agrees to \_\_\_\_' is conceptually wrong" because the victim "should never be forced to engage in, abstain from, or surrender anything to stop the abuse" and "should never leave mediation with [an] agreement[] that ha[s] bargained away [her] safety rights and/or made these rights conditional on some necessary performance of [her] own"); Hart, *supra* note 26, at 318-19.

Peacemaking's primary approach to coercion in the process is to rely on the peacemaker and the victim's family to stand up for the victim. As noted earlier, reliance on the victim's family to ensure that no "gang-ups" occur may be misplaced where the family is frightened of the batterer or where the family blames her for the batterer's violence.<sup>370</sup> Additionally, the batterer's family members may be instrumental in the development of a batterer's belief that his violence is the result of his partner's victimization of him. Peacemaking may provide a platform for the expression of those beliefs.<sup>371</sup> Further, the use (or lack of use) of criminal sanctions may be instrumental in an individual batterer's understanding of the morality of his actions or of their harm to the victim: "If this were a crime, it would be heard in a criminal courtroom."<sup>372</sup> However, unlike the family court mediator, the peacemaker may play a very interventionist role in the Peacemaking session.<sup>373</sup> A peacemaker committed to gender fairness has the ability to confront victim-blaming statements and to increase the likelihood of fair outcomes.

The second type of coercion problem arises when battered women are forced to participate in informal adjudication. This is frequently an issue in mediation related to family law issues, particularly child custody.<sup>374</sup> Mediation gives the batterer access to the victim, which may allow for an additional site for intimidation and physical abuse. The batterer may attack the woman in the parking lot after the session, follow her home and learn where she lives, or use the session to verbally abuse and blame her.<sup>375</sup> The inattention to safety is also found in what mediation does *not* do. As Barbara Hart notes,

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370. See Hooper & Busch, *supra* note 2, at 120–21 (noting that if families or mediators in family group conferencing are afraid of the batterer, they will not confront his violence, and questioning the message to the perpetrator and the victim if this happens).

371. See *id.* at 119.

372. For example, a study comparing nondetected rapists with convicted rapists found that nondetected rapists believed that they were not guilty of a crime because the victim did not file a police report. See Alberto Godenzi, *What's the Big Deal? We Are Men and They Are Women, in JUST BOYS DOING BUSINESS? MEN, MASCULINITIES, AND CRIME*, *supra* note 1, at 135, 147–48.

373. See *supra* notes 148–157 and accompanying text (describing the role of the peacemaker).

374. See, e.g., Grillo, *supra* note 26, at 1551–52 (describing the increase in the use of mandatory mediation in California family court, particularly to solve child custody and visitation issues); Hooper & Busch, *supra* note 2, at 110 (noting that violence often escalates at the time of separation, so divorce mediation may happen at a particularly dangerous time, and that the perpetrator may use mediation to gain access to the victim). This is not an issue, generally, in victim-offender mediation in which victim participation is voluntary and the victim's preference regarding the time and location of the session must be honored so that the victim feels safe. See Umbreit, *supra* note 6, at 204.

375. See Astor, *supra* note 26, at 158 ("[Mediation] places fewer barriers between the perpetrator and the target of his violence. It offers opportunities for continued contact with the target of his violence where she may be unprotected and where violence and coercion can continue.").

mediation services seldom provide the strategic planning and legal interventions that battered women most need to ensure their safety.<sup>376</sup>

In Peacemaking, this second kind of coercion is a particular problem in the many self-referred cases.<sup>377</sup> Initially, the Navajo judiciary anticipated that most Peacemaking cases would be court referred.<sup>378</sup> Safeguards for court-referred cases include requiring party agreement<sup>379</sup> and, in the case of domestic violence protection orders, requiring additional anti-domestic violence training for the peacemaker.<sup>380</sup> None of these protections apply, however, in the more than 50%<sup>381</sup> of Peacemaking cases that are self-referred.<sup>382</sup> To file a petition for Peacemaking, the petitioner must claim that she or he has been "injured, hurt or aggrieved by the actions of another."<sup>383</sup> The petition is reviewed by a district court judge, but there is seldom a hearing and, at any rate, the hearing would involve only the petitioner. The practice after court review may vary by district. Some peacemaker liaisons, who are employed by the judiciary and administer Peacemaking in their districts, may routinely call respondents to get information about such matters as scheduling and appropriate people to invite to attend the Peacemaking sessions.<sup>384</sup> However, it is not clear that this practice is universal, and, more importantly,

376. See Hart, *supra* note 26, at 320. Similarly, Hooper and Busch note that family group conferencing facilitators in New Zealand have found it difficult to "deal with ongoing issues [in domestic violence cases], such as the distress arising from 'reliving' the experience of victimisation." Hooper & Busch, *supra* note 2, at 108.

377. The risks may outweigh the benefits of Peacemaking if there are no individual sessions with battered women regarding safety planning and lethality assessment. See Hart, *supra* note 231, at 219 (describing the elements of a criminal justice response necessary to address the needs of battered women, including safety planning, lethality assessments, and referrals to domestic violence programs).

378. See Zion, *supra* note 133, at 1.

379. Though the rules do not require the victim's consent if Peacemaking is made a condition of probation, my interviews with judges and peacemakers suggest that referrals are seldom made without the victim's agreement, at least in domestic violence cases. See PEACEMAKER CT. R. 6.3(d), in ZION & MCCABE, *supra* note 56, at 109 (noting that a court may refer a case to Peacemaking as a condition of probation "[when] appropriate . . . for achieving harmony and reconciliation with the victim"). Diversion to Peacemaking for cases that involve injury to a person or property require the victim's consent. In civil cases, the court may order a case to Peacemaking for "good cause," but again the practice appears to be more protective of victims. See *id.* 6.2, at 109. The judges I spoke with told me that domestic violence cases were never referred over the objections of victims. See Interview with Marilou Begay, *supra* note 13; Interview with Mae Horseman, *supra* note 13. Of course, there is always the danger that the court does not know of the domestic violence in a family court case. I found no evidence of screening for domestic violence.

380. See Domestic Abuse Protection Act, NATION CODE tit. 9, § 1652 (Equity 1995).

381. See *supra* note 174 and accompanying text.

382. See PEACEMAKER CT. R. 3.2(a), in ZION & MCCABE, *supra* note 56, at 105.

383. *Id.*

384. This is the practice in Crownpoint, for example, where the peacemaker liaison always calls the respondent. See Interview with Crownpoint Peacemakers, *supra* note 9.

I found no evidence that peacemaker liaisons routinely ask respondents whether they feel safe attending Peacemaking or whether they have experienced violence at the hands of the petitioners.<sup>385</sup> Additionally, if respondents volunteer information regarding domestic violence, there appears to be no guarantee that they will receive information about social services, alternative legal processes, or safety-related issues.<sup>386</sup> The respondent and other parties named by the petitioner as well as those named by the respondent, if the liaison speaks with the respondent, receive a subpoena to attend Peacemaking.<sup>387</sup> The subpoena does not give information regarding the possibility of resisting it on the basis of reasonable fear of domestic violence,<sup>388</sup>

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385. In at least one peacemaker division, this kind of screening does appear to take place on a regular basis. See Interview with Crownpoint Peacemakers, *supra* note 9 (noting that at least one peacemaker interviewed makes certain to talk to the respondent, at least on the phone, prior to any Peacemaking session). Provided that the victim/respondent is encouraged to disclose the level of violence, the peacemaker may determine whether the case is appropriate for Peacemaking. Umbreit and Howard Zehr, leading proponents of victim-offender mediation and restorative justice in the United States, argue that one of the potential weaknesses of family group conferencing is the usual lack of in-person contact with the victim and her supporters in which they are prepared "for participation in a dialogue in which the mediator is not dominating the conversation, assessing their needs/expectations, and gaining a far more human context of the crime." Umbreit & Zehr, *supra* note 357, at 27.

386. Peacemakers may not receive adequate training in judging the dangerousness of an abuser. Domestic violence training for peacemakers is now mandated. See Domestic Abuse Protection Act, NATION CODE tit. 9, § 1652(c) (Equity 1995). However, both peacemakers and anti-domestic violence advocates acknowledge that the training received thus far has been spotty, not attended by all peacemakers, and brief in duration. See *supra* note 217. For a discussion of judging batterer lethality, see *Assessing Whether Batterers Will Kill*, in CONFRONTING DOMESTIC VIOLENCE: EFFECTIVE POLICE RESPONSE (Penn. Coalition Against Domestic Violence 1990). Batterer lethality assessments are commonly used by battered women's advocates to assist them with safety planning. Safety planning involves the woman's thinking through her options in various ways: How might she change her routine (work arrival time, carpooling, living arrangements, social involvements) in order to avoid the batterer? Can she ask her neighbors to alert the police if they see him in the neighborhood? How should her children answer the door or phone if he violates the restraining order and comes by or calls? Does she have a code word that, when given to a friend over the phone, means "call the police"? Does she have someone who can check on her at regular times? Can she get a security escort at work? Do the children's school authorities know not to release the children to him?

387. See PEACEMAKER CT. R. 1.5, in ZION & MCCABE, *supra* note 56, at 102.

An order compelling individuals to submit to Peacemaker Court proceedings as parties, witnesses or participants is binding upon any member of the Navajo Tribe and any Indian living among the members of the Navajo Tribe. Non-Indians may be compelled to participate in Peacemaker Court proceedings as a witness or participant but not as a party.

*Id.*

388. Other than resistance based on the court's lack of jurisdiction, it is not clear what basis a respondent or witness would have for resisting a duly authorized subpoena. Neither the Navajo Court Rules of Criminal Procedure nor the Navajo Court Rules of Civil Procedure provide any. Rule of Criminal Procedure 13(c) provides that a party who receives a subpoena for the production of documentary evidence and objects may move to quash or modify the subpoena "if compliance would be unreasonable or oppressive," but it does not describe the circumstances under which a witness might resist a subpoena. See NAVAJO R. CRIM. P. 13(c).



nor does it give any information regarding support services. Thus, battered women respondents often assume they have no choice but to appear.<sup>389</sup>

The lack of screening for safety and the inability of respondents to decline appearance for good cause—including fear of the petitioner—are surely among Peacemaking's greatest weaknesses.<sup>390</sup> Without safeguards, a session may provide the abuser an opportunity to physically assault, threaten, and intimidate his partner or ex-partner.<sup>391</sup> This allows batterers to initiate Peacemaking to flush a woman out of hiding.<sup>392</sup> A petitioner may be prompted by his partner's separation, his desire to see his children who are in hiding with their mother, or in response to a partner's domestic violence protection order. One petitioner whose file I reviewed explained his request for Peacemaking in the following language:

I want my relationship to last a life time no matter what bad things I've done. I want her family to give me a chance. A chance to make a living with their daughter. I've got nothing against her family, my parents have nothing against them too. I want to show that I can do it. Make a living with her.<sup>393</sup>

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389. See Telephone Interview with Cecelia Lowe, Counselor with A.D.A.B.I., in Chinle, Navajo Nation, Ariz. (Apr. 16, 1997). The Peacemaking respondent receives a subpoena that states:

YOU ARE HEREBY COMMANDED to appear before the [above entitled] Peacemaker Court of the Navajo Nation as indicated below [date and time], and to give all cooperation to the named Peacemaker. You are required to provide whatever information you have on the matter of the dispute of the individual named below and to produce any documents or other items you may have in your possession which may assist in providing such information.

....

DISOBEDIENCE OF THIS SUBPOENA IS A CONTEMPT OF COURT AND PUNISHABLE AS A CRIME UNDER THE LAWS O[F] THE NAVAJO NATION.

ZION & MCCABE, *supra* note 56, at 146.

390. This is not to say that respondents are never successful at stopping Peacemaking from happening. Battered women's advocates relate that sometimes when women or shelter workers have talked with the peacemaker or the peacemaker liaison, the session has been canceled. See Telephone Interview with Cecelia Lowe, *supra* note 389. Other women, however, have not been so fortunate. See *infra* note 400 and accompanying text.

391. Of course, all of the advocates' concerns could be called "safety concerns" in that they all have implications for the recurrence of domestic violence.

392. Several advocates discussed conversations with women in which the women did not feel that they had any choice regarding attendance in Peacemaking. See Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author); Telephone Interview with Cecelia Lowe, *supra* note 389; see also PEACEMAKER CT. R. 3.8, in ZION & MCCABE, *supra* note 56, at 106 ("The Peacemaker may obtain any necessary subpoena for the attendance of parties, witnesses or other interested persons from the clerk of District Court. Such subpoenas shall be served in accordance with the Rules of Civil Procedure.").

393. Shiprock File Review, *supra* note 9 (noting that the petitioner's wife had filed a domestic violence protection order against him and had requested that Peacemaking be postponed until the results of her domestic violence protection order hearing were known).

His petition was filed after his wife filed a petition for a domestic abuse protection order in which she alleged that he had abused her “on several occasions [both] before and after [she] had [their] child.”<sup>394</sup> Some battered women’s advocates describe numerous phone calls they have received from peacemaker liaisons urging them to encourage a battered woman to talk directly with the liaison, even though she repeatedly communicated through shelter staff that she had no desire to do so and was too frightened to attend Peacemaking.<sup>395</sup> As one battered women’s advocate explained:

My clients get intimidating letters [from Peacemaker Court] saying they have to come to Peacemaking. The women get really scared. The women are forced to go. I’ve had two other clients who tried to get out of Peacemaking. One had gone to the shelter and [her partner] filed for Peacemaking. She was really scared. She had left the reservation [to get away from him] and was living in another town. [The] Peacemaking liaison started coming to [the domestic violence program], pushing [staff] to disclose the woman’s location. The . . . staff replied that the information was confidential. The [battered] woman asked [the domestic violence program] staff to tell [the] liaison that she didn’t want to do this. The liaison kept telling staff that he just wanted to talk with her, that he had to hear from her directly. So the staff recommended that she put her concerns in writing and the staff delivered the letter. Even then the liaison still wanted “just a few minutes with her.”<sup>396</sup>

Informal advocacy has worked to keep some battered women out of Peacemaking,<sup>397</sup> and some peacemakers use informal screening mechanisms to eliminate more severe domestic violence cases.<sup>398</sup>

I had to intervene in a similar case. I said, look there’s something weird about this situation where this man is insisting he has to see his wife. He calls my office, he calls the peacemaker. . . . [W]e’d better investigate and we need to confront him about why he’s doing this. Something is going on here . . . some stalking is going on, we need to investigate deeper. If I was a peacemaker I would [not] be in a position to protect that female. That’s just my law enforcement background,

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394. *Id.*

395. See Telephone Interview with Cecelia Lowe, *supra* note 389.

396. *Id.*

397. See *supra* note 390.

398. See Interview with Philmer Bluehouse, *supra* note 15; see also Interview with Crown-point Peacemakers, *supra* note 9. While every peacemaker I talked with believes that most domestic violence cases can be handled in Peacemaking, some feel that the really severe cases should not be. See Interview with Philmer Bluehouse, *supra* note 15; see also Interview with Leo Natani, *supra* note 12.

but whether some [other] peacemakers would sense that in that situation, I don't know.<sup>399</sup>

Some women have been attacked immediately following a Peacemaking session:

[A woman who was ordered to attend Peacemaking] left her children with [the battered women's program] while she was in Peacemaking [nearby]. She didn't want to go, but felt pressured into going. Her husband filed for Peacemaking. In Peacemaking, he agreed to no abuse and counseling for alcohol and violent behavior and in the meantime to leave her alone. She was afraid of him. He said that he was a good father. They told her to stay with him. She agreed, [but said,] "We're in a safe space now, we'll get back together later." She left the court to get her children. He followed her and tried to run her off the road. He jumped out of his truck and got into the back of her truck and tried to grab her through the window. She drove to the police station. The police didn't do anything.<sup>400</sup>

Because Peacemaking is a "traditional" activity, some women may also feel a more subtle form of coercion to attend out of respect for their elders and for Navajo tradition.<sup>401</sup>

While battered women's advocates' stories of coercion undoubtedly represent the experience of some battered women, they do not represent the experience of all. In my review of twelve self-referred cases, at least half of

399. Interview with Philmer Bluehouse, *supra* note 15. Bluehouse followed with a comment that suggests that the outcome might have been different had the petitioner's family been more supportive of his efforts. "I can see that Peacemaking might work if his side of the family [were] saying we need to deal with this issue; but this guy was running around like the Lone Ranger." *Id.* Bluehouse also notes that with family members present, the lethality of the abuser will likely emerge in Peacemaking.

[The peacemaker can discern dangerousness in a Peacemaking session because the family will] tell you these things out front . . . . Somebody will say, "Yea, I know you've been carrying a knife, been carrying a gun." . . . In Peacemaking those self-incrimination issues are not relevant: it just all comes out, and that's the opportunity. . . . [Although] you [do] find those people who are intellectualizing and denying, [but] even those people become very evident through the process and you have to have [a] strategy to deal with that.

*Id.*

400. See Telephone Interview with Cecelia Lowe, *supra* note 389. My review of the Peacemaking files found several cases involving severe violence. Further investigation is necessary to determine whether court-referred cases or self-referred cases make up the greater percentage of those involving severe violence.

401. See, e.g., Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author) (noting that many people do not want to criticize Peacemaking because it is considered "traditional"). "Traditional" may have different meanings. On one understanding, "traditional" Navajo values are gender-egalitarian values; another might see traditional values as those held by older Navajos, many of whom may be influenced by Christian views. See *supra* note 311 and accompanying text.

the petitioners were women.<sup>402</sup> In seven of the twenty confirmed domestic violence cases, the couple reconciled, at least temporarily.<sup>403</sup> In four, the couple divorced.<sup>404</sup> In three cases, either the peacemaker or one of the parties indicated that the case would go to family court for a divorce or a protection order, or both.<sup>405</sup> Thus, my preliminary review of Peacemaking files suggests that a significant number of women were not intimidated into making agreements or into reconciliation. For some, Peacemaking offered the opportunity to express the reasons for ending their marriage. The following notes expressing a petitioner's reason for filing for Peacemaking provide an example.

[We've] been married for 14 years and 9 months, but . . . have only lived under the same roof for about 6 or 7 years total. . . . We've gotten [into] many physical confrontations, both hurting the other, some requiring [a] doctor's care. . . . So I am asking the [P]eacemaker [C]ourt to assist us in resolving a termination of this marriage . . . . I believe we have hurt, shamed, humiliated, and mistrusted each other long enough. We both need to end this marriage to begin our healing—healing emotionally, mentally, physically and spiritually in our own ways. My [way] is with my faith in my higher power . . . .<sup>406</sup>

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402. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9. Three of the remaining petitioners were men, and in three cases I could not determine which party was the petitioner. (These cases were counted as self-referred because they were listed as such on the docket or the files did not contain the information normally found in a court-referred case (e.g., court orders, petitions, and notes related to court disposition of the case).) In cases initiated by women, four described their husband's drinking as the reason for seeking Peacemaking, and two said it was their husband's abuse ("to dissolve marriage due to [husband's] abuse"). See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

403. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9. In six, either no agreement was reached or the resolution was unclear from the file. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

404. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9. Peacemakers hear a number of divorce cases, though many of them are default cases. Of the 192 cases heard in Peacemaking in Window Rock in 1996, 23 were recorded "divorce/abandoned/separation," 12 as "marital dispute," and 22 as "family dispute/family harmony." Forty-five per cent (87) were family-related, 11 were referred by family court, and 17 by criminal court. See Window Rock File Review, *supra* note 9.

405. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9. In six, either no agreement was reached or the resolution was unclear from the file. See Shiprock File Review, *supra* note 9; Window Rock File Review, *supra* note 9.

406. Window Rock File Review, *supra* note 9 (citing a peacemaker's notes recording a petitioner's reason for seeking Peacemaking). The Alcoholics Anonymous language is probably no accident. See Telephone Interview with Eileen Hudon, *supra* note 114 (explaining that because chemical dependency treatment monies have been a major source of federal funding for services in Indian nations, the models that dominate these programs have a significant influence in Indian responses to domestic violence).

For the most part, problems of coercion could be remedied with procedural changes. In general, the coercion problems underscore the importance of (a) allowing battered women to choose whether to participate; (b) giving battered women information about Peacemaking's process as well as alternatives to Peacemaking, about its strengths and limitations, and about available services that will allow an informed choice;<sup>407</sup> (c) taking measures to ensure the woman's safety through lethality assessments of the batterer, through safety planning with the woman, and through declining to have a session when it is too dangerous; and (d) the importance of a strong antisubordination, antisexist normative Peacemaking process.<sup>408</sup> I do not argue that the courts or peacemakers should make unilateral determinations of which cases are appropriate for Peacemaking and which are not.<sup>409</sup> Instead, I urge aggressive outreach to petitioners, respondents, and other parties with a sensitivity to the possible presence of domestic violence. The outreach should include information regarding social services such as shelters. Additionally, battered women should be able to move to quash a subpoena on the basis of domestic violence, or fear of domestic violence, and this right should be prominently displayed on the subpoena form.<sup>410</sup> Peacemaking cases involving domestic violence might be referred to family court for a domestic violence protection order that would remain in effect throughout Peacemaking.<sup>411</sup>

These changes may be problematic for some peacemakers who interpret Peacemaking's tenet that parties must decide for themselves to preclude the use of coercive state power.<sup>412</sup> Yet many peacemakers currently rely on the coercive power of the state in order to push compliance and par-

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407. See Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1695 (1997) (noting that participants in community-enhancing mediation should at a minimum be given information about the values represented in the process so as to make an informed decision); Hart, *supra* note 26, at 325-26 (describing criteria for a divorce process system that meets the needs of battered women).

408. See discussion *supra* Part I.C.2 of the use of traditional Navajo narratives in this endeavor.

409. See Crites & Coker, *supra* note 368, at 42 (describing a Honolulu mediation preparation program in which program staff counsel battered women about mediation, and then program staff, in consultation with the battered woman, determine whether her case is appropriate for mediation).

410. Peacemaker Court Rules provide that a party may file an injunction to stop Peacemaking on the basis of harassment. See PEACEMAKER CT. R. 4.1(a), in ZION & MCCABE, *supra* note 56, at 107. This apparently only applies after the process has begun. Other than a challenge to personal jurisdiction, the Navajo Nation Code does not clearly address a respondent's right to resist a duly authorized subpoena for Peacemaking. See *id.* 3.8-4.2, at 106-07.

411. This is already the situation in some number of cases. See Interview with Mae Horseman, *supra* note 13.

412. See Interview with James W. Zion, Solicitor General of the Navajo Nation, in Window Rock, Navajo Nation, Ariz. (Apr. 23, 1997) (notes on file with author).

ticipation in Peacemaking.<sup>413</sup> Thus, use of these domestic violence intervention strategies may be in keeping with the thoroughly pragmatic view of many peacemakers: If fear of punitive measures will work to encourage behavior change, then use punitive measures.<sup>414</sup>

## B. The Cheap-Justice Problem

Restorative justice processes such as family group conferencing or victim-offender mediation may place too much emphasis on the importance of offender apology. This creates two kinds of cheap-justice problems: First, an overemphasis on offender rehabilitation at the expense of expressions of moral solidarity with the victim may ignore the victim's needs and coerce the victim to forgive the offender; second, a sincere apology or reconciliation between the offender and the victim may fail to address the victim's primary needs.<sup>415</sup>

Restorative justice programs are sometimes captured by a focus on offender rehabilitation, which pressures victims to cooperate with offender-centered measures and assumes that offender rehabilitation will meet the victim's needs.<sup>416</sup> The victim becomes merely a means to the end of "healing" the offender. In the most egregious cases, mediators may pressure victims to offer offenders forgiveness.<sup>417</sup> If the victim is made to feel responsible

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413. See Notes on Peacemaking Session, *supra* note 11 (noting that the peacemaker urged the respondent to comply with the family's request that she seek addiction treatment and relied, in part, on the threat of pending criminal charges and the threat of a child neglect complaint to social services).

414. See Interview with Crownpoint Peacemakers, *supra* note 9 (describing how the fact that police are watching batterers ensures greater compliance with Peacemaking agreements); Notes on Peacemaking Session, *supra* note 11 (noting that the peacemaker told the parties that they could deal with their child neglect and drug abuse issues in Peacemaking or they could face implicitly more punitive treatment in court).

415. See YAMAMOTO, *supra* note 1, at 194–96.

416. See Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1277–81 (1994) (describing the danger of focusing on the offender in victim-offender mediation); Goel, *supra* note 2, at 26 (citing Crnkovich, *supra* note 25, *passim*) (noting that the victim was outnumbered, the greatest focus was on the offender and how to help him and not on the impact of the abuse on the victim and her children, the victim responded to the judge's direct questions and then only acknowledged the concerns and wishes of the community leaders, and the victim spoke only three times and was nervous throughout).

417. See Suzanne M. Retzinger & Thomas J. Scheff, *Strategy for Community Conferencing: Emotions and Social Bonds*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 1, at 315, 316 (noting that the "core sequence" of community conferencing is the offender's expression of genuine shame and remorse and the victim's taking a step towards forgiving the offender). The authors further write that the facilitator should rechannel the victim's moral indignation in order to enable the victim to identify with the offender. See *id.* at 323. Moral lectures from the mediator, victim, or the victim's supporters "signal[] the moral superiority of the instructor," which "disrupts rather than builds the social bond" between the victim and the offender. *Id.* at 325.

for forgiving or aiding the offender, the justice aspect of the process—the recognition of the harm as unilateral rather than mutual and the recognition of the immorality of the offender's behavior and its harm to the victim—is in jeopardy.<sup>418</sup> This apology focus may be particularly harmful for battered women, or for any victim who has (or had) a close relationship with the offender. Batterers are often adept at describing themselves as the *real* victims<sup>419</sup> and at explaining their abuse as an understandable response to victims' provoking behavior.<sup>420</sup> These "explanations" may be couched in terms of an apology: "I'm so sorry I hurt you. I didn't mean to do that. Why do you get me so crazy? You know how upset I get." Such an apology is coded: "I don't want to hit you, but you make me do so." It also suggests a quid pro quo remedy: "You don't make me 'crazy,' and I won't hit you." An informal justice process that pushes victims to accept the offender's apology and forgive presents battered women with a similar quid pro quo: "In return for his apology, you must forgive him." The coded message may be: "And if you do not do your part and forgive him, how do you expect him to do his part and stop the battering?"<sup>421</sup>

A second concern arises when apologies are overvalued: Words are cheap. Even when the focus is to make the victim whole,<sup>422</sup> rather than to reform the batterer, facilitators may value apologies at the expense of more material changes. Giving a privileged place to the apology of the abuser is particularly problematic in battering relationships. It is wrong to think that apologies are necessarily hard for abusers to make; abusive men often have a history of making apologies for their behavior.<sup>423</sup> Some batterers are particularly adept at using apologies to manipulate their partners and others. Further, the batterer need not be insincere at the time of the apology for the apology to be ineffective. Without changes in his belief system, in his social networks, and often in his corollary behaviors such as drinking and

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418. When the victim voluntarily comes to feel empathy towards the offender or wishes to aid the offender, justice is not compromised. However, when the victim is made to feel that forgiveness is the only morally justifiable position, or that the victim "owes" the offender anything—her forgiveness, her time, her aid—justice is jeopardized. Braithwaite would refer to this as the blaming aspect of the process. See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 156 (1989).

419. See Adams, *supra* note 32, at 186; Coker, *supra* note 182, at 117–21 (describing batterers' claims of emotional self-defense).

420. See Adams, *supra* note 32, at 186–87; Coker, *supra* note 182, at 71–72.

421. See Fischer et al., *supra* note 26, at 2158–59, 2164. A focus on apology may also reinforce social imperatives that punish women who refuse to forgive. Cf. Grillo, *supra* note 26, at 1550 (noting that women tend to be more relationship-focused than men).

422. See Zion & Yazzie, *supra* note 5, at 77–79 (describing *nalyeeh*, or reparations, in Peacemaking as that which is necessary to make the victim whole).

423. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 96–97 (1984).

drug use, he is likely to resort to battering again when faced with the inability to get his wife to comply with his demands.<sup>424</sup>

As Eric Yamamoto notes in the context of “race apologies,”<sup>425</sup> apologies are empty if “they are based on inadequate acknowledgments or have no material affect on the participants’ relationship . . . .”<sup>426</sup> The abuser’s apology must be accompanied by changes in his underlying belief system that provides the context for a relationship of domination. If there is no commitment to the restructuring of that relationship, it is “just talk” and “cheap reconciliation.”<sup>427</sup>

Yamamoto argues that intergroup racial healing requires that the apologizing group study the history of the intergroup conflict, “interrogate” the “stock stories that groups . . . tell to explain the conflict and [to] justify the groups’ responses,”<sup>428</sup> and take “active steps toward healing,” which include “a joint reframing of stories of group identities and intergroup relations.”<sup>429</sup> Only then is the group ready to make reparations. Further, reparations are not merely the payment of money, but rather “acts of repairing damage to the material conditions of racial group life—transferring money and land, building schools and medical clinics, allowing unfettered voting—and of restoring injured human psyches—enabling those harmed to live with, but not in, history.”<sup>430</sup>

It is this carefully considered form of apology followed by reparations that is needed in battering cases. This requires a review of the harms that the batterer’s behavior has caused the victim. These harms far exceed the physical trauma of violence and include psychological harms, economic harms, political harms, and spiritual harms. Further, reparations do not mean merely compensating the victim for such costs as lost wages or health-related

424. See *supra* Part I.C.1.a (discussing the multiple influences that support battering).

425. Race apologies are apologies from one group to another for collusion in racially subordinating behavior. See YAMAMOTO, *supra* note 1, at 51. Yamamoto is concerned about the requirements for meaningful apologies between people of color. He seeks a method for answering the question: “When do apologies lead to a meaningful restructuring of intergroup relations?” *Id.* at 58. When are they simply masks for continuing status quo oppression? See *id.*; see also Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 49 (1997) (examining South Africa’s Truth and Reconciliation Commission in light of these elements of interracial justice).

426. YAMAMOTO, *supra* note 1, at 194–95.

427. *Id.* at 175. Yamamoto proposes four steps necessary for reconciliation: recognition, responsibility, reconstruction, and reparations. See *id.* at 174–75. By recognition, Yamamoto means that groups must “empathize with the anger and hope of those wounded.” *Id.* at 174. Taking responsibility requires one to “assess carefully the dynamics of race group agency in imposing disabling constraints on others and . . . accepting group responsibility for healing resulting wounds.” *Id.* at 174–75. Reconstruction involves “active steps . . . toward healing.” *Id.* at 175.

428. *Id.* at 179–80.

429. *Id.* at 175.

430. *Id.* at 203.



expenses,<sup>431</sup> but taking steps that “result over time in a restructuring of the institutions and relationships that gave rise to the underlying justice grievance.”<sup>432</sup>

In Peacemaking, the use of *nalyeeh*, the ability to encourage concrete commitments to personal change (alcohol treatment and batterer’s treatment programs, and traditional healing ceremonies), coupled with a focus on familial responsibility, may go a long way in ensuring that apologies are accompanied by concrete changes in behavior.<sup>433</sup>

### C. The Normative Problem

The normative problem that exists in mediation stems from the ideology of mediator neutrality coupled with the hidden or informal rules that disadvantage women,<sup>434</sup> enact gendered understandings of appropriate mediating behavior,<sup>435</sup> and largely ignore claims of past injustice between parties.<sup>436</sup> In family court mediation, the ideal mediator is supposed to be neutral, with the sole purpose of effectuating the desires of the parties.<sup>437</sup> As Trina Grillo writes, this ideal of neutrality frequently masks mediation’s informal rules of behavior:<sup>438</sup> Focus on the future and not the past, do not be too emotional, and especially do not be too angry.<sup>439</sup> Sara Cobb similarly notes the manner

431. See, e.g., N.J. STAT. ANN. § 2C: 25–29 b(4) (West Supp. 1999) (allowing a court to order the restraining order defendant to pay monetary compensation to the victim for losses suffered as a direct result of the act of domestic violence).

432. YAMAMOTO, *supra* note 1, at 208.

433. Of course, weak enforcement of Peacemaking agreements seriously undermines the ability of Peacemaking to be a catalyst for this kind of restructuring of relationships. See *supra* notes 390–406 and accompanying text (discussing safety and coercion concerns for Peacemaking that are related to weak enforcement mechanisms).

434. See Fineman, *supra* note 333, at 730–31, 759–60.

435. See Cobb, *supra* note 54, at 398; Grillo, *supra* note 26, at 1555–56.

436. See Fischer et al., *supra* note 26, at 2160–61; Grillo, *supra* note 26, at 1563–64.

437. See Grillo, *supra* note 26, at 1587. Freshman describes this as the “private-ordering understanding of mediation,” in which “[the] mediator simply teases out the parties’ values and helps them craft a resolution that reflects their values.” Freshman, *supra* note 407, at 1692 (emphasis omitted).

438. See Grillo, *supra* note 26, at 1550. Divorce mediation “imposes a rigid orthodoxy as to how [participants] should speak, make decisions, and be. This orthodoxy is imposed through subtle and not-so-subtle messages about appropriate conduct and about what may be said in mediation.” *Id.* Grillo notes that in the “informal law of mediation” there is the “good woman” who is cooperative, does not deny her feelings, does not shift her feelings onto her children, believes that it is important that her husband stay involved in her children’s lives, is rational and not bitter or vengeful, and understands that she played a role in harms that afflict her, believing that family problems are no one person’s fault. The “bad woman” is bitter, wants revenge, fights over trivial things, is greedy and ready to sacrifice her children as a tool against her husband, is irrational, and vents her anger rather than negotiating constructively. See *id.* at 1555.

439. See *id.* at 1574–81 (discussing how mediators often punish displays of anger, especially when exhibited by women and most especially by women of color); Astor, *supra* note 26, at 153 (asserting that mediators judge anger displays by men differently from those by women). Cobb

in which mediation “domesticates” stories of violence by moving the focus from the victim’s rights to the victim’s needs.<sup>440</sup> In part, this is a result of a mediation methodology that eschews fact finding and blame. For battered women, this creates the risk that mediation will reinforce the batterer’s belief in the rightness of his behavior, minimize the harm of his violence and control, and undermine the victim’s belief in her right not to be beaten.<sup>441</sup> The insistence on a purportedly neutral mediator fails to identify the immorality of the batterer’s (past, present, ongoing) behavior<sup>442</sup> and limits the support a mediator can give a battered woman.<sup>443</sup>

Restorative justice programs do not prescribe a neutral mediator ideal, but the difficulty in determining what norms to apply may be no less of a problem. This difficulty is acknowledged by the more thoughtful proponents of restorative justice measures.<sup>444</sup> For example, while John Braithwaite and

notes that when mediation themes become dominant during mediation (rather than competing moral ideals), “‘responsibility,’ ‘resolution,’ ‘participation,’ and ‘peacemaking’ are valorized. The violence plot line does not extend beyond the session, so there is no plan for protection for the victim and there are no apologies. Violence becomes mutualized as it is reformulated as a ‘dispute.’” Cobb, *supra* note 54, at 416.

440. See Cobb, *supra* note 54, at 410 (resulting from an analysis of 30 community mediation sessions). Mediation’s privacy is also criticized both because it fails to hold mediators accountable via public scrutiny and because it recreates the privacy of the family, thus recreating norms of denial and minimization of abuse. See Astor, *supra* note 26, at 158–59, 163; see also Freshman, *supra* note 407, at 1734 (noting that even with the mediator neutrality ideal, “mediators [still] channel discussion toward certain types of values rather than others by expressing varying degrees of approval or disapproval for certain values” and that “mediators may [also] use certain kinds of values as limits on the kinds of agreements possible, such as expressing disapproval for agreements that vary ‘too much’ from what a court might do”).

441. See GORDON, *supra* note 346, at 257–64 (describing battered women’s development of a “right to not be beaten”).

442. See Fischer et al., *supra* note 26, at 2160 (noting that mediation’s focus on the future denies the victim’s experiences of domestic violence and deprives her of any redress for past wrongs suffered). So strong is the presumption of neutrality that mediators in a mediation program that instituted safeguards creating special obligations on mediators to protect victims from battering complained that the safeguards compromised their neutrality. See Barsky, *supra* note 27, at 21.

443. As Astor notes, the mediator must not appear to be partisan, or else she risks problems with compliance or with convincing parties to continue. Yet if she treats the parties “equally”—meaning just the same—it will reinforce the existing inequality between the parties. See Astor, *supra* note 26, at 153; see also Fischer et al., *supra* note 26, at 2163 (“The tenet [of not judging blameworthiness] forces the mediator to treat spousal abuse and domination neutrally.”). Cobb notes that “because mediation celebrates relativism (there are multiple moral codes and all are legitimate), all moral orders are legitimate in mediation. There is no way for mediation to advance an absolute moral code that stands outside the moral code of the mediation process itself.” Cobb, *supra* note 54, at 402.

444. I refer to family group conferencing as a restorative justice program, as do many restorative justice proponents. See, e.g., Umbreit & Zehr, *supra* note 357, at 24. However, Braithwaite and Daly describe family group conferencing as an example of republican justice. See Braithwaite & Daly, *supra* note 1, at 193. For a more thorough description of republican justice, see generally BRAITHWAITE & PETTIT, *supra* note 37.

Kathleen Daly suggest using community conferencing in domestic violence cases, they acknowledge that “[i]t would not be possible to have regulatory institutions where only feminist voices were heard and misogynist voices were completely silenced.”<sup>445</sup> Conferencing, like Peacemaking, allows the offender to tell his story, but in conferencing there is no guarantee that the facilitator or others will challenge explanations for battering that are victim blaming or gender biased.<sup>446</sup> Without the guarantee that the process will be guided by an antibattering norm, the victim of domestic violence takes a calculated risk that other participants in conferencing will support her claims.<sup>447</sup>

Peacemakers do not pretend to be neutral with regard to the application of behavioral norms.<sup>448</sup> Though the parties are never asked to agree explicitly to the use of traditional Navajo norms and values, it is likely that all participants have some generally accurate expectation regarding those norms and expect them to be applied in Peacemaking.<sup>449</sup> The role of the peacemaker

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445. Braithwaite & Daly, *supra* note 1, at 208. They nonetheless believe that, given the fact that a majority of people oppose domestic violence, community conferencing creates an opportunity for dialogue about gender that is not available in formal adjudication. *See id.* (“[Community conferencing can] create spaces to advance struggles for feminist voices to be heard against those of misogynists.”).

446. In addition to the harm done to the victim, if these statements are unchallenged they may reinforce the batterer’s belief in justifications for his violence. In turn, such a process cannot create a safe space that allows the recognition that the batterer may *himself* be the victim of systems of subordination, prejudice, and family histories of abuse while also being the victimizer. To allow such a recognition, without assurances of an antimisogyny norm, is to invite the minimization of the violence or to blame the victim for the violence.

447. Both family group conferencing and Peacemaking rely on the victim’s family to provide her with support. For a discussion of the problems with this reliance, see Hooper & Busch, *supra* note 2, at 120–21.

448. They do strive to be neutral with regard to fairness to the parties. *See* Interview with Crownpoint Peacemakers, *supra* note 9. Freshman describes Peacemaking as a “community-enhancing” process because it “should enhance the salience of a particular community in either, or both, of two ways: (1) individuals should resolve disputes according to the community . . . and (2) individuals should leave the process more firmly incorporating that community in their sense of who they are.” Freshman, *supra* note 407, at 1749. Freshman argues for a third way, a “community-enabling” model, which provides parties with information regarding the various normative options and allows them to choose. *See id.* at 1761–66. The more difficult question may be what happens when the parties disagree as to the norms that should apply. Who gets to decide? (And not deciding is also a decision, because all options operate with some norms that more or less constrain choices.) In the context of domestic violence, I would enlist clear antisubordination norms that would be trumped only by the victim’s autonomy and that would bar all other dissent to those norms. In this regard, the process that I suggest—and that I argue Peacemaking approximates—is much closer to the (supposed) norms of the judicial system than are other mediation processes.

449. This community-enhancing understanding, however, may be compromised by the coercive nature of the respondent’s participation. *See* Freshman, *supra* note 407, at 1758–60 (writing that community-enhancing mediators may fail to provide participants with the information needed to make an informed choice regarding participation). In self-referred cases, which are the majority, a petitioner may initiate Peacemaking and force a respondent to engage in Peacemaking even if the respondent objects. *See* the discussion of coercion *supra* Part II.A. While court rules

(or *naat'aanii*) is to guide the parties to a decision rather than to tell them what to do, but the "*naat'aanii's* opinion about the right way of doing things is important to the parties. The 'lecture' or opinion [of the *naat'aanii*] is also important for the process of *naat'aah* or planning."<sup>450</sup> The peacemaker is an interested person who instructs participants in appropriate Navajo behavior. She may use Navajo creation stories and journey narratives to teach a moral lesson.<sup>451</sup>

While Peacemaking does not subscribe to the ideal of a neutral mediator, there may be other normative problems in practice. Peacemaking's fluidity and focus on restoring relationships creates the possibility of bias and informal rule application. To some extent, this is an inherent danger in any adjudicatory process.<sup>452</sup> Judges and juries interpret facts and weigh evidence filtered through bias and unexamined stereotypes.<sup>453</sup> Common biases in the Navajo context may be an overemphasis on the importance of alcohol in explaining domestic violence<sup>454</sup> and a promarriage (or antiodivorce) bias.<sup>455</sup>

My review of Peacemaking files found evidence that some peacemakers hold an antiodivorce bias,<sup>456</sup> which I discuss below. However, I did not find evidence that the problem was as widespread as battered women's advocates

and judicial practice protect the domestic violence victim from referral from court to Peacemaking over his or her objection, there are no similar formal protections for the victim who is made a respondent in a self-referred Peacemaking.

450. . Zion & Yazzie, *supra* note 5, at 78.

451. See *supra* Part I.C.2 for a discussion of the use of Navajo traditional stories for teaching purposes.

452. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 434 (1991) (finding that appellate courts more frequently reverse convictions of defendants who claimed self-defense in the homicides of their intimate partners, because trial judges operate with bias against battered women defendants).

453. See, e.g., Ammons, *supra* note 343, at 1071 (asserting that racist stereotypes may prevent jurors from believing that battered African American women can be helpless); Maguigan, *supra* note 452, at 434; Mahoney, *supra* note 49, at 80.

454. See Telephone Interview with Eileen Hudon, *supra* note 114 (describing the influence of the chemical dependency treatment paradigm in understanding domestic violence). Alcohol is described (overtly or implicitly) as the real problem in a number of accounts of Peacemaking's use in domestic violence cases; however, my own interviews with peacemakers suggested a more nuanced view. See Interview with Crownpoint Peacemakers, *supra* note 9.

The peacemakers stated that while situations vary, common themes in domestic violence cases include jealousy, batterers' alcohol use, and how the individuals were raised as children. See *id.* "[I]f you are not taught how to be a man, how to be a responsible person, then when you are faced with all this responsibility once you get married, you can't handle it." *Id.* Imogene Long, one of the peacemakers interviewed, explained that peacemakers take people back to their upbringing and help them "reveal their inner feelings." *Id.*

455. Some of the battered women's advocates I spoke with were concerned that peacemakers were antiodivorce and that this bias would lead them to minimize the violence or treat it as mutual. See Interviews with Battered Women's Advocates, *supra* note 17.

456. See *infra* notes 460–463 and accompanying text.

fear. Peacemaking routinely handles uncontested divorces,<sup>457</sup> and clearly there is no formal policy of keeping marriages intact. Bluehouse tells peacemakers in training, "I'd rather have these people separated as friends than together as enemies."<sup>458</sup> As noted previously, at least half of the self-referred petitioners in the files I reviewed were women, and a significant number of them were either seeking divorce or saw Peacemaking as a last effort to save the marriage prior to divorce.<sup>459</sup>

Yet some peacemakers do appear to have an antidivorce bias.<sup>460</sup> For example, one peacemaker expresses a sense of failure at the woman's insistence that the marriage is over: "The peace making hearing didn't go well to keep the marriage[,] as the woman doesn't want to go on . . ." <sup>461</sup> The peacemaker notes further that "the wife refused to consider stabilizing their marriage because . . . she [has] given him chances . . . but it gets back to being abused by him due to [his] jealousy."<sup>462</sup> The peacemaker's statement implies not only that success means keeping a marriage together, but also that a woman who does not desire to stay married is acting inappropriately. Peacemakers in Crownpoint told me they frequently suggest temporary separations of sixty to ninety days, during which time the parties are to seek counseling and the abuser is to cease all acts of abuse and intimidation.<sup>463</sup>

457. See Window Rock File Review, *supra* note 9.

458. Interview with Philmer Bluehouse, *supra* note 15. It may be that some peacemakers pressure parties to stay together when the parties have not been separated for long or when both parties are available, but that they abandon this ideal when it seems impractical.

459. See *supra* notes 402–406 and accompanying text.

460. Five of the 11 domestic violence cases reviewed in Shiprock resulted in a reconciliation. See Shiprock File Review, *supra* note 9. Of the remaining six cases, the parties appeared to be headed for divorce in three: In one, the wife withdrew her request for Peacemaking and asked that the case be referred back to court for a domestic violence protection order hearing because the husband continued to drink and abuse her; in the second, the wife stated that she had no desire to continue with the marriage because of her husband's ongoing violence, jealousy, and refusal to get work; in the third, no agreement was reached and the peacemaker referred the couple to court for a divorce action. Two cases never reached Peacemaking: In one, the respondent wife requested a postponement pending a domestic violence protection order hearing; in the second, information in the file was inadequate to explain why the session never took place. No agreement was reached in the remaining case. See *id.* Of the 11 domestic violence case files reviewed in Window Rock, six initiated Peacemaking in order to complete divorce proceedings, including one petitioner who dropped her case before Peacemaking took place. Only three resulted in reconciliation agreements. In one of the three reconciliation cases, the wife later wrote the Peacemaker that the husband had failed to keep his promise to attend alcohol counseling and she requested a referral to family court. In one case the resolution was unclear, and in another, there was no agreement because the husband refused to participate. See Window Rock Review File, *supra* note 9.

461. Shiprock File Review, *supra* note 9.

462. *Id.*

463. See Interview with Crownpoint Peacemakers, *supra* note 9.

At the end of that time period, the couple meets again to determine whether or not to live together. Given the focus on repairing relationships, a woman who has no desire to continue in a relationship with an abusive ex-partner may be seen as acting inappropriately in Peacemaking.

Peacemaking may sometimes domesticate women's stories of violence in the manner Cobb describes as true of mediation. For example, my review of Peacemaking files found that some peacemakers treat domestic violence as anecdotal or allow the violence to be framed as mutual when it clearly is not.<sup>464</sup> A criminal court referral case in Shiprock serves to illustrate this domesticating effect.<sup>465</sup> The criminal complaint noted that the defendant stepped on the victim's neck, hit her in the face, and kicked her all over her body. She had numerous visible injuries. In Peacemaking, the defendant explained that sometimes he has to stay out of town for his job. After one of those times, his wife asked him where he had been. An argument ensued and she threw a flowerpot at him, that did not hit him. The defendant "was mad [and] started fighting." After beating her, he stayed out of the house for a week and then wrote a letter to her apologizing. They subsequently resumed living together. According to the peacemaker's notes, the man concluded by saying, "I'm really sorry for what happened. I care for you and love you. I wouldn't hurt you in any way again. From now on we will live a

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464. See *infra* notes 465–470 and accompanying text. I found evidence of domesticating by peacemakers in a small number of Peacemaking files. For example, there is no evidence that the peacemaker confronted the denial regarding the husband's abuse in the following case, in which the respondent wife states:

Before he used to beat me up. He use to drink before also. He use to say that these are not his kids. . . . He doesn't support his kids. He says he is gonna have to have blood tests before he pays for his kids. . . . The kids have to make their own jewelry to make money. I want to work, but he says no. . . . Our marriage will not work.

Shiprock File Review, *supra* note 9. The husband's mother focuses on the unfairness of the wife's leaving with the children while the husband was away:

[I]t is not right, [the wife] gets mad at him when she lived with us. I get up early in the morning for him and send him off to work. One morning [the wife] had the stuff packed up on the truck and said [she was] taking it some place else. [She] took everything except his stuff. . . .

*Id.* The peacemaker writes, "No agreement was reached. They are very upset with each other along with family members from both. There were a lot of accusations and tension." *Id.* It is possible, of course, that the peacemaker instructed the husband regarding his support obligations and nonviolence, but the peacemaker's statements that imply that the problems are mutual suggest otherwise. The peacemaker's conclusion fails to address the impact of the husband's behavior: The mother and the children appear to be homeless; the children feel hurt that their father denies his paternity; and the children are forced to make jewelry to support themselves because their father refuses to pay support. See *id.*

465. Though the file noted that the referral came from criminal court, it was impossible to tell if it was diverted to Peacemaking or if Peacemaking was a condition of sentencing.

good life. You will have to understand my work too.”<sup>466</sup> The wife responds,

Yes[,] I threw things because I was mad. I care for him but it happened[.] . . . We’ll talk about this at home and not do it again.

....

Yes[,] I care for you and I’m sorry for what we did to each other. I wouldn’t do it again. I would be a good wife to take care of each other.<sup>467</sup>

The man’s story (“you will have to understand my work too”) as well as the woman’s story (equating throwing a flowerpot with a brutal beating) domesticate<sup>468</sup> the violence by implying that it is symptomatic of a conflict and is therefore mutual. The peacemaker concludes: “They forgave each other in Peace Making. They both agreed to love[,] trust and respect each other so that the dispute would not reoccur again.”<sup>469</sup> This conclusion not only fails to controvert the view of mutual responsibility for the beating, but it also suggests that the woman’s lack of trust as reflected in her questions about the man’s whereabouts is somehow equivalent to his violence.<sup>470</sup>

In other files, the abuser’s violence, even when not understood as the central problem, was treated seriously. For example, a criminal case in which the defendant attended Peacemaking as a condition of probation ends with the following agreement: “The petitioner agrees that she will have an agreement to file [a] criminal complaint against her partner and the woman he is having an affair with, if he keeps on doing that. She is going to give him another chance.”<sup>471</sup> The respondent also agreed to stop having affairs.

One of Peacemaking’s central strengths is its flexibility and its ability to allow petitioners to define the problem in their own terms. On the other hand, this may present problems for battered women when their abusive partners are the petitioners. Unless the peacemaker liaison engages in significant discussion with the respondent or conducts an independent investigation

466. Shiprock File Review, *supra* note 9.

467. *Id.*

468. See generally Cobb, *supra* note 54, at 416–19 (describing the domestication of violence in mediation stories).

469. Shiprock File Review, *supra* note 9.

470. For a discussion of the manner in which women’s “provoking” words are understood as equivalent to a physical assault, see Coker, *supra* note 182, at 109–10.

471. Shiprock File Review, *supra* note 9. Note that in this case it is the victim who is treated as the petitioner and thus allowed to be the first to describe the problem. The respondent described the trouble he was in: He was on probation for six months and he had to report to his probation officer every two weeks, and he had to pay the petitioner \$300 in restitution. It may be that the court-imposed criminal sanction was responsible for the difference in attitude of both the victim and the defendant compared with that of the prior story. It is also just as probable that the difference lay in the peacemaker. See *supra* notes 163–167 and accompanying text (discussing the great flexibility of practice in Peacemaking, which allows for differing approaches and viewpoints among peacemakers).

prior to the Peacemaking session,<sup>472</sup> the petitioner's description of the problem may narrow the focus of the session.<sup>473</sup>

The manner in which a peacemaker frames the problem may serve to limit the issues addressed in Peacemaking. For example, when an elderly mother was referred to Peacemaking by a hospital social worker, the focus of the session was on the mother's complaints about her two adult daughters' substance abuse and neglect of their children.<sup>474</sup> Family members, including other daughters (sisters of the two), their husbands, and an elderly uncle spoke movingly to the two about the impact of their behavior on the rest of the family and their concerns for the daughters' children. All urged alcohol treatment.<sup>475</sup> Other issues, such as one daughter's claim that the petitioner mother had abused her when she was a child or that the petitioner was presently neglecting their severely incapacitated alcoholic father, were acknowledged but were not the focus of the session.<sup>476</sup>

Barbara Wall describes a Peacemaking session initiated by a mother with her adult son.<sup>477</sup> The mother's focus was the son's alcoholism. Wall describes the reconciliation between mother and son and the son's agreement to seek help for his alcohol addiction. Nearly lost in Wall's account is a brief mention of the son's abuse of his wife.<sup>478</sup> From Wall's description, it appears that the son's domestic violence was not envisioned as the focus of Peacemaking. The wife's need for protection and the son's need to seek assistance with stopping his violence received relatively little attention.<sup>479</sup>

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472. Some models of conferencing do this. See Braithwaite & Daly, *supra* note 1, at 192–93. Many of these issues may be said to relate to any restorative justice measure or to the underpinnings of restorative justice theory itself.

473. The impact of the domestic violence movement may be responsible for the limited number of protection order or criminal domestic violence cases referred to Peacemaking. Cases of parent-child, adult-child, sibling, or other familial or interfamilial violence are far more commonly referred from protection order hearings than are intimate violence cases. The assumption that dynamics of power, coercion, and intimidation are not at work in some of these relationships may be problematic. In one case, adult sisters told the peacemaker that they did not want to meet alone with their brother because of his past violence directed at them. Despite this request, the Peacemaking resulted in further private sessions between the three. See Shiprock File Review, *supra* note 9.

474. See Notes on Peacemaking Session, *supra* note 11.

475. One daughter agreed to go to treatment and the other refused. See *id.* It may be an indication of the importance of outside coercive elements that the daughter who agreed to go to treatment was facing criminal charges related to drug possession and was encouraged to believe that cooperation in Peacemaking might assist her in the drug case. See *id.*

476. These issues were not entirely ignored. The peacemaker referred the elderly mother to counseling and urged the father's presence at the follow-up Peacemaking session. See *id.*

477. See Barbara E. Wall, *Navajo Conceptions of Justice in the Peacemaker Courts*, J. SOC. PHIL. (forthcoming 2001).

478. See *id.*

479. See *id.* It may be that the assumption that the son's alcoholism caused the violence was a more important determinant of how domestic violence was treated in the session.



#### D. The Communitarian/Social-Change Problem

Restorative justice processes such as victim-offender mediation and family group conferencing are said to “elevat[e] the role of crime victims and communities in the justice process.”<sup>480</sup> Restorative justice processes are then contrasted with processes that foreground the relationship between the offender and the state, rather than the offender, the victim, and the “community.”<sup>481</sup> The communitarian problem with such processes is two-fold, the first being closely related to the normative concern just discussed. Just as restorative justice processes such as family group conferencing may overrely on family members to invoke anti-domestic violence norms, such processes may overrely on community members to do the same. The second communitarian problem is the absence of a meaningful discussion of the parameters of “community responsibility,” both in terms of offender rehabilitation and in terms of crime creation or maintenance.<sup>482</sup>

While opinion polls may find significant opposition to domestic violence,<sup>483</sup> such sentiment may not translate into support for the broader goals of women’s autonomy.<sup>484</sup> Community members may condemn the violence while still holding sympathy for “the hapless man who must defend against a nagging, shrewish woman.”<sup>485</sup> It is one thing to condemn a man’s smashing his wife’s jaw; it is another to recognize the violent act’s continuity with his refusal to allow her to work or have access to the car.<sup>486</sup> Similarly, it is one thing to condemn a man who hits his wife “because” he is drunk or “because” she questioned him about his extramarital affairs, but when the man’s violence is prompted by the wife’s violation of norms that are widely held to be appropriate for wives—e.g., sexual fidelity, adequate child care or housework, sexual access—condemnation may not come so readily. Rather than hold the abuser accountable, community values may be just as likely to hold accountable the wife who fails or refuses to put dinner on the table in a timely manner. The question, then, must be: Why is it that we trust com-

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480. Umbreit & Zehr, *supra* note 357, at 24.

481. *See id.*

482. For a more thorough analysis of what community might mean in the context of mediation, see Freshman, *supra* note 407, at 1743–71.

483. *See* Braithwaite & Daly, *supra* note 1, at 208 (noting that recent opinion polls find that most people oppose the use of violence against wives). Braithwaite and Daly also acknowledge that this does not necessarily translate into antimisogynist views. *See id.*

484. *See supra* note 37 and accompanying text (discussing the meaning of autonomy).

485. Coker, *supra* note 182, at 110 (describing the manner in which the belief that “men are emotionally victimized” by women with superior verbal skills serves to reinforce batterers’ views that their victims provoke the violence).

486. *See* PENCE & PAYMAR, *supra* note 184, at 2–3 (describing the tactics of control used by men who batter).

munities in the context of restorative justice processes to invalidate the social beliefs that underpin battering behavior more than we trust other community representatives like judges, police, and juries?

The second communitarian problem with restorative justice processes is that community responsibility is seldom understood in the affirmative manner needed in domestic violence cases.<sup>487</sup> Much of the restorative justice literature presents the community's role in the process as forgiving and reintegrating the offender into the community and reassuring and reintegrating the (now alienated) victim.<sup>488</sup> The community's role in crime creation is seldom addressed.<sup>489</sup> While the issues of denial and responsibility may be similar for the community and for the family, they are different in two important ways: First, the responsibility of a more diffuse group for supporting battering may appear even more attenuated and thus less credible, and second, while the community may appear less responsible, it may be even more important (for the victim) to cast a broader net of responsibility than to establish familial responsibility.

Implicating the community serves to draw the connections between women's economic and social conditions and battering.<sup>490</sup> This analysis then points to a wider view of remedies and a wider pool of resources to support those remedies. In addition, recognizing community responsibility provides a more complete description of the "gender entrapment"<sup>491</sup> to which women are often subject and thus assists the woman in naming the sometimes invisible binds that make freedom so hard to find. Domestic violence cases require a more expanded and clear notion of community responsibility and the use of an antimisogyny norm. The failure to give the term "community responsibility" real content fails to account for structural disparities in power—disparities that frame and provide context for the interactions between participants in restorative justice processes.

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487. See McCold, *supra* note 55, at 89 (noting that the emphasis of restorative justice processes on individual offenders and victims "may divert attention from the root causes that continuously produce [crime]").

488. See, e.g., UMBREIT, VICTIM MEETS OFFENDER, *supra* note 355, at 1–9.

489. See *supra* note 55 and accompanying text. A minority of restorative justice scholars even attempt to define "community." See Braithwaite & Daly, *supra* note 1, at 192–93 (describing community conferencing's use of "communities of concern" composed of people who care about either the offender or the victim or both); McCold, *supra* note 55, at 91–92 ("Should the conflict exist between married partners and the injury involved physical harm, the boundary of the interested community widens to include, at the least, other non-primary family members and associates."). Similarly, Braithwaite's concept of reintegrative shaming has also been criticized for his failure to address "the key question he raises—how, if at all, can culture be changed." Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 556 (1992).

490. See *supra* notes 185–198 and accompanying text; see also Schneider, *supra* note 55, at 534–35.

491. See generally RICHIE, *supra* note 259.

Peacemaking differs from group conferencing, in part, because its normative community may be more clear.<sup>492</sup> First, it identifies traditional Navajo processes as best for Navajo problems. Community is thus defined as Navajo.<sup>493</sup> However, the understanding of both "traditional" as well as "Navajo" may be contested.<sup>494</sup> For example, battered women's advocates worry that Peacemaking's reliance on clan and familial relationships is misplaced. These advocates worry that the value of traditional stories and the importance of clan and familial relationships are seriously undermined in a setting in which many younger Navajo have little or no understanding of or respect for those stories or values.

[The] Navajo value system has been so confused, has been so adulterated by the dominant society. . . . [My aunt's] . . . grown daughter was getting beaten by her husband and the aunt . . . didn't understand why the daughter wasn't satisfied [with her marriage.] After all, [her husband] didn't drink and he was a good provider. So people's experiences make them put one thing as more important than anything else. So maybe if you grew up in an alcoholic household, then you think that if the husband doesn't drink, then that is the most important thing.<sup>495</sup>

This general breakdown in clan relations is exacerbated by the intergenerational effects of abusive boarding school experiences and by the advent of a wage economy that gave Navajo men more economic power than Navajo women.<sup>496</sup> As one battered women's advocate told me, "They don't even respect their parents[;] how can [peacemakers] expect them to . . . [respect] their spouse . . . ?"<sup>497</sup> Similarly, some battered women's advocates point to

492. See *supra* Part II.C (describing the normative problem in informal adjudication processes).

493. I do not mean to provide a jurisdictional rule here. Peacemaking is available to non-Navajo including non-Indians. Rather, I am suggesting that the practice that is most referenced in Peacemaking, the use of traditional Navajo stories and the traditional teachings of peacemakers, represents an implicit definition of community. See Freshman, *supra* note 407, at 1749 (describing community-enhancing mediation).

494. For a related argument, see Freshman, *supra* note 407, at 1712 (writing that the problem with community enhancing that is aimed at serving the interests of the community is determining "which community has the best claim to represent or regulate a particular couple").

495. Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author).

496. See *supra* note 105 and accompanying text (discussing changes in the economy that have undermined women's status).

497. Interview with Anonymous Battered Women's Advocate, in Navajo Nation (n.d.) (notes on file with author). Other advocates stated that they believed a process such as Peacemaking might work when clan and familial relationships are strong but not when they have been weakened by years of colonization, such as in the Navajo Nation; the necessary cultural context simply no longer exists to ensure compliance. See Telephone Interview with Eileen Hudon, *supra* note 114.

the fact that significant numbers of Navajo are not fluent in the Navajo language, and thus stories and teachings in Navajo do not carry either the literal meaning or the cultural resonance that peacemakers presume. Battered women's advocates also worry that clan relationships that would ensure compliance with Peacemaking agreements are seriously compromised.<sup>498</sup>

Criticisms of Peacemaking's reliance on fragile or nonexistent clan relationships may fail to account for the diversity of Peacemaking practice and the pragmatic practice of many peacemakers.<sup>499</sup> Many spoke of the alienation of people and saw their role as trying to help people understand the relevance of traditional teaching.<sup>500</sup> Peacemakers see their practice *both* as (re)creating traditional concepts of clan and family responsibility and as utilizing these relationships to reform behavior. This creates certain contradictions. Many peacemakers agree with concerns regarding the loss of traditional values but do not appear to share a uniform or fixed understanding of traditionalism<sup>501</sup> or a belief that only those who are traditionalists will be moved by Peacemaking.<sup>502</sup> Some peacemakers seem to assume that parties must have *some* basic understanding of traditional Navajo thinking, however tenuous or inchoate. Others seem to see Peacemaking as a vehicle for restoring Navajo values, even for the completely ignorant, and particularly

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498. They note that parent-child bonds are often stronger than clan bonds and that parent-child bonds may foster denial and protection of an abuser son. See *supra* notes 211–212 and accompanying text (discussing denial on the part of parents); see also Interview with Sharon Tsingine & Donovan Brown, *supra* note 17 (describing their experiences with Navajo mothers who protect their sons).

499. The ability to “Navajo-ize” new technologies is a significant strength of Navajo culture. See Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17 (describing the batterer's program as “Navajo-izing” concepts from other programs). Farella argues that Navajo adaptation of new technologies, rather than proof of acculturation, is “an attempt to maintain a traditional epistemology. . . . [A] labeling of the new as old and of change as an attempt to stay the same.” FARELLA, *THE MAIN STALK*, *supra* note 262, at 189–90. Farella concludes, “the Navajos are not change oriented but rather . . . are changing in order to remain ‘traditional.’ Specifically, they are altering their technology to maintain their epistemology.” *Id.*; see also Austin, *supra* note 4, at 48 (advocating the use of Navajo common law as a “back to the future” movement).

500. The practice of Peacemaking appears to vary significantly. See *supra* notes 163–167 and accompanying text. For example, the film prepared by the Peacemaker Division presents a session in which the parties speak hardly at all and the peacemaker speaks a great deal. In the session that I observed, the participants were allowed a great deal of time to express their concerns, while the peacemaker played the role of facilitator and guide. In yet another session, described to me by a participant, the peacemaker lectured the parties at length and gave the battered woman the opportunity to vent her feelings but did not encourage much talk from the batterer. While the Peacemaking session that I observed was conducted in both Navajo and English, the peacemaker spoke primarily in English to the younger Navajo, slipping into Navajo to speak with the older members. In addition, prayers and teachings were conducted in a mix of Navajo and English.

501. See Nader & Ou, *supra* note 308, at 25–26 (describing the deployment of notions of traditionalism).

502. See Interview with Crownpoint Peacemakers, *supra* note 9.

among the young.<sup>503</sup> In addition, some peacemakers are not at all hesitant to use the coercion of Anglo adjudication or the threat of police action when necessary to encourage cooperation.<sup>504</sup>

It is likely that some peacemakers overstate their ability to create from these fragments a sense of cultural identification, and that they thus understate the difficulty in changing entrenched misogynist beliefs that are reinforced by dominant Anglo-European culture and that often reflect parental modeling.<sup>505</sup> Thus the challenge to Peacemaking, if it is to make a real change in domestic violence, is to call upon a definition of what it means to be Navajo that is pro-gender egalitarian in a time in which there is much evidence of an entrenched gender hierarchy and widespread denial regarding the prevalence of domestic violence. The challenge for Peacemaking is the challenge for all anti-domestic violence work: how to create social change.<sup>506</sup> It is in this regard that traditional gender-egalitarian stories may act to transform not only the batterer's view of his relationship, but also his view of himself.<sup>507</sup>

While some peacemakers may overstate their ability to change behavior, others readily acknowledge that they are unable to control the behavior of parties outside of Peacemaking.<sup>508</sup> They believe, nonetheless, that what happens in Peacemaking frequently has a significant impact on behavior.

To what extent do peacemakers address the second communitarian problem, recognizing community responsibility in violence creation and maintenance? I asked Bluehouse, "How does [Peacemaking] work if none

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503. See Interview with Ruthie Alexis, *supra* note 12.

504. For example, when I asked peacemakers in Crownpoint how they ensured compliance with Peacemaking agreements, they noted that usually the abuser who is in Peacemaking knows that he is being watched by the police and is afraid of what will happen if he abuses again. It is not clear if they were referring to all domestic violence cases, including self-referrals, or only to those that are court-referred. See Interview with Crownpoint Peacemakers, *supra* note 9. Peacemaker Ruthie Alexis used a somewhat similar tactic in the Peacemaking session that I observed. Alexis told two women, accused by their elderly mother of neglecting their children, that she could make a call to the child protection agency and they could deal with this in court or they could agree to work at it in Peacemaking. See Notes on Peacemaking Session, *supra* note 11.

505. See *supra* note 250 (describing research regarding the intergenerational aspect of domestic violence).

506. If peacemakers and battered women's advocates join forces, they may both be strengthened in this endeavor. There are efforts underway to increase the cooperation between peacemakers and anti-domestic violence advocates. The domestic violence training mandated by the Domestic Abuse Protection Act, NATION CODE tit. 9, § 1652 (Equity 1995), has provided a forum for discussion. See Telephone Interview with Gloria Champion, *supra* note 125. James Zion, an outspoken advocate of Peacemaking, has actively sought the opinions of battered women's advocates with regard to Peacemaking. See Interview with Cheryl Neskahi-Coan & Helen Muskett, *supra* note 17. However, the need for increased dialogue and joint anti-domestic violence efforts continues.

507. See *supra* notes 294-296 and accompanying text.

508. See Interview with Crownpoint Peacemakers, *supra* note 9.

of the other kind of [traditional] mechanisms for enacting [gender harmony] are in place . . . ? How can Peacemaking as a process reinforce [or] recreate[] gender harmony if . . . mechanisms [of clan relationships and gender egalitarianism] have been so splintered?" Bluehouses's thoughtful and honest response suggests the difficulty and challenge of linking Peacemaking to larger goals of social change:

All I can say, I have to understand that that has happened, that one of my jobs is to be an advocate to bring that to forefront. There's been 200 years of damage . . . . [One won't] see changes over night . . . . I need to acknowledge that for some people [Peacemaking is] not going to work, but for those for who[m] it works, my God it works! . . . I think that a lot of our traditional people still have those values. It's just those of us who have gone off to school and become attorneys and stuff like that. That may be the question in disguise: [I've] lost it all and how do I find that? I have to keep plugging along. I've been known not to be the favorite son of certain Christian types and not [to be the] favorite son of certain traditional types, because I'm caught in between. . . .

It's a good question. It's a darn good question. What other kinds of mechanisms does Peacemaking want to be a part of? Well, naturally, I'm not one to completely reject western [ways]. When [you] take [a] look at lots of traditional ways there are lots of overlaps. My job is to point out those overlaps and to say *this* is how we say it in Navajo and *this* is how we say it in English.<sup>509</sup>

### CONCLUSION: LESSONS FROM NAVAJO PEACEMAKING

This Article moves back and forth between a study of the specifics of Navajo Peacemaking in domestic violence cases and an exploration of Peacemaking's theory of adjudication and its lessons for intervention strategies in domestic violence more generally—even when those possibilities are imperfectly realized in current Navajo practice.

In the struggle for greater autonomy and for some measure of safety against male violence, women choose methods and resources, discarding those that fail to work and refining those that, while not perfect, provide some advantage. Women's experiences of battering are framed by their experiences of other subordinating experiences: racism, childhood abuse, and economic deprivation.<sup>510</sup> These experiences are also framed by women's

509. Interview with Philmer Bluehouse, *supra* note 15.

510. See DUTTON, *supra* note 34, at 12 (describing how a woman's responses to battering are filtered through the experiences and circumstances of that woman, including her race, her economic position, whether she is a survivor of childhood abuse, her health status, and whether she is gay or straight).

political and cultural ideals and commitments. While there is no one intervention strategy that will work for all women, one critical measure of the effectiveness of any strategy is its capacity for placing resources—material, emotional, spiritual—in the hands of battered women. In some locales, this may best be accomplished through informal mechanisms that engage intentional communities, such as churches or civic organizations, in assisting battered women.

As developed in this Article, the Navajo Peacemaking model may increase a woman's material resources through *nalyeeh* and referrals to social services.<sup>511</sup> It may increase her familial, emotional, and spiritual resources through its assistance in reconnecting her with family, redefining for her in-laws her relationship with their abusive son, providing referrals to counseling (both secular and spiritual), and through demonstrating care and support.<sup>512</sup> Peacemaking offers other potential benefits for some women. It may assist in disrupting familial supports for battering because family members are subpoenaed and peacemakers confront familial denial and minimizing.<sup>513</sup> Peacemaking may directly address the abuser's victim blaming, excusing, or minimizing statements.<sup>514</sup> Peacemaking may allow for the recognition of the impact of oppressive systems in the lives of men who batter without resort to excuse or victim blaming.<sup>515</sup> Peacemaking thus avoids the "responsibility versus description" dichotomy of formal adjudication that limits its ability to address the complexity of battering behavior.

Peacemakers value relationships, even relationships with a batterer. Because peacemakers do not presume that separation is the best course of action, women are free to see Peacemaking as their last hope for saving a marriage. Peacemaking may provide women with tools to change the balance of power within their relationships.

Peacemaking also provides partial remedies for the problems that plague other informal adjudication. Rather than mediation's neutral ideal, peacemakers see themselves as fair but interested intervenors whose role is to instruct and to guide.<sup>516</sup> Thus, Peacemaking has the potential to operate with a clear and overt antimisogyny norm.<sup>517</sup> This antimisogyny norm may

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511. See *supra* notes 217–245 and accompanying text.

512. See *supra* Part I.C (describing the benefits of Peacemaking).

513. See *supra* notes 206–215 and accompanying text (describing peacemakers who "cut through" batterers' denial).

514. See *supra* notes 206–215 and accompanying text.

515. See *supra* Part I.C.1.b.

516. See *supra* notes 448–451 and accompanying text.

517. See *supra* Part I.C.2 (discussing the use of traditional Navajo stories to promote gender-egalitarian relationships).

be strengthened by the use of traditional Navajo stories that emphasize the importance of gender balance and complementariness.<sup>518</sup>

The Navajo Peacemaking experience underscores the necessity of an antimisogyny norm. Peacemakers who equate battering with a conflict or disagreement may domesticate<sup>519</sup> the abuse. When peacemakers are clear that the abuse is an important object of intervention and that it is harmful and the responsibility of the abuser, it provides the possibility for real change in the batterer's thinking.<sup>520</sup> It can reframe the battering. It may force the batterer to listen to "his family tell of the ordeal and . . . what they went through during this time of terror."<sup>521</sup>

Despite these potential benefits, Peacemaking is no more ideal at meeting the goal of promoting women's autonomy than are other imperfect interventions. Indeed, as described in this Article in some detail, Peacemaking's current practice creates real dangers for some women, primarily because it coerces participation in self-referred cases.<sup>522</sup> Additionally, safety is compromised because Peacemaking does not routinely provide battered women with the information they need to make an informed decision about whether to enter Peacemaking.<sup>523</sup> Some peacemakers appear biased against divorce, thus sandwiching women between the separation focus<sup>524</sup> of formal adjudication and a stay-married focus<sup>525</sup> in Peacemaking. But this is not always the case. Some peacemakers routinely assist women in obtaining a divorce, some women come to Peacemaking expressly to use the process to gain a divorce, and a significant number of women take their case to family court when they are unhappy with Peacemaking's results (or with their partners' failure to change).<sup>526</sup>

What are the lessons of Navajo Peacemaking for designing informal domestic violence intervention strategies?<sup>527</sup> First, such a process must have

518. See *supra* notes 287–296 and accompanying text.

519. See Cobb, *supra* note 54, at 410–13.

520. See Zion, *supra* note 150, at 18–19 (describing the importance of cognitive change in Peacemaking's intervention with batterers).

521. Window Rock File Review, *supra* note 9 (quoting a peacemaker's description of a Peacemaking session).

522. See *supra* Part II.A.

523. See *supra* Part II.A.

524. See *supra* note 325 and accompanying text.

525. See *supra* notes 456–463 and accompanying text.

526. See *supra* note 460 and accompanying text.

527. This provisional description is not meant to provide a detailed blueprint but to offer suggestions for further analysis and inquiry. I do not address here how such a process might be invoked: whether through court referral, whether only in criminal cases following a guilty plea (or at least a "no contest" plea), whether available by agreement of the parties regardless of court process, or whether available through civil protection order hearings. Quite separately, such a process may be organized informally, without any state role, by intentional communities such as churches.



safeguards to limit the abuser's ability to use the process to locate and continue to abuse the woman. Cases should be screened to identify battering. Respondent victims should be able to opt out. They should be given full information regarding the pros and cons of the process (as compared with others), and should be assisted with safety planning. Such a process would borrow from Navajo Peacemaking the understanding that fairness need not mean neutrality.<sup>528</sup> This is particularly true with regard to the facilitator's understanding of violence and controlling behavior. The facilitator should use not only an antiviolenence norm but also an antimisogyny norm.<sup>529</sup> Peacemaking demonstrates the power of stories used in the furtherance of such a norm. In pluralistic American culture, stories compete.<sup>530</sup> The facilitator in the informal process I imagine would, much as the most common batterer's treatment programs now do,<sup>531</sup> support a story that values women's autonomy.<sup>532</sup>

Like Peacemaking, this process should allow for a description of the oppressive structures that operate in the life of the batterer without reinforcing his sense of "victimhood" or entitlement.<sup>533</sup> This underscores the process's link to social justice, spirituality, and the capacity for individual change.<sup>534</sup> It allows women to affirm cultural and political identity—their solidarity with men in antiracist, anticolonialist work—without sacrificing

528. See *supra* note 448 and accompanying text.

529. This distinguishes Peacemaking from Braithwaite and Daly's proposal for community conferencing. See Braithwaite & Daly, *supra* note 1, at 192–94 (discussing normative problems in their community conferencing proposal).

530. Of course, stories compete in the Navajo context as well. See *supra* note 308 (discussing Laura Nader's work on the deployment of harmony ideologies to subordinate Native people).

531. See PENCE & PAYMAR, *supra* note 184, at 30. I do not mean to suggest that this process would replace batterer's treatment programs. In most circumstances, lengthier and more detailed processes will be required for batterer reform.

532. For example, one story with some popular currency is that of marriage as a partnership of equals. See June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1095 (1999) (arguing that social science research demonstrates that "the parental model that produces the best [custody] outcomes for children is one of supportive partnership"). In the context of intentional communities such as Christian churches, the Biblical admonition to husbands to "love your wives, even as Christ also loved the Church, and gave himself for it" may provide yet another story basis. *Ephesians* 5:25 (New Revised Standard Version). Batterer's intervention programs encourage participants to rethink their understandings of gender relations and to adopt a different story. See PENCE & PAYMAR, *supra* note 184, at 78, 89–178 (describing a batterer's program that encourages abusers to replace attempts to control women with elements of the "Equality Wheel," which includes nonviolence and the ability to negotiate fairly).

533. See *supra* Part I.C.1.b.

534. See Harris, *supra* note 48, at 41. Harris notes that despite the 1995 Million Man March's identification with "a patriarchal black nationalism that uses sexism and heterosexism," its theme of "'atonement' called attention to the need for struggle within the African American community itself for greater integrity and self-awareness." *Id.*

their right to be free of gender-related violence. Such a process should value connection and relationships but should equally value choice—enlarging women's ability to choose by increasing women's resources.

The remedies available might include those currently available in restraining-order processes. For those who are separating, this might include such remedies as stay-away provisions, child custody and visitation, and child support.<sup>535</sup> For those who live together, it might include prohibitions against violence, harassment, stalking, and phone calls at work.<sup>536</sup> It might also include affirmative agreements to share housework or childcare, to express anger in noncontrolling and nonthreatening ways,<sup>537</sup> to seek alcohol and batterer's treatment, and to cease certain battering-supporting friendships.<sup>538</sup> As proposed by Braithwaite and Daly, it should include changes in the distribution of family assets so as to provide the woman with greater economic independence.<sup>539</sup>

Without a sense of clan and familial responsibility, it may be difficult to persuade an abuser's family to provide the victim with goods and services.<sup>540</sup> However, agreements involving victim reparations will often, in actuality, draw on familial assets. The process should encourage the attendance of the victim's family members as well, which will sometimes strengthen frayed family relationships.

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535. See, e.g., FLA. STAT. ANN. ch. 741.30 (West Supp. 1999) (providing that courts may issue domestic violence protection orders that restrain the respondent from committing any acts of domestic violence, award the petitioner exclusive use of the dwelling, award temporary child custody and/or visitation rights, establish child support, order the respondent to participate in treatment, intervention or counseling services, and may provide "other relief as the court deems necessary").

536. See *id.* ch. 741.31.

537. Men in batterer's programs frequently are taught to take "time-outs" when they feel angry. During a time-out, a person uses positive "self-talk" (statements that reorient from feeling like a victim to feeling in control of oneself and not others) to "cool down." Time-outs are never to take the place of real dialogue. There must be an agreement to return to the source of disagreement at a certain time. See PENCE & PAYMAR, *supra* note 184, at 56–58. Of course, time-outs can become a way of controlling the conversation and ensuring that you never have to listen to complaints or disagreements.

538. There may be a significant overlap between battering-supporting friendships and drinking buddies. See BOWKER, *supra* note 200, at 54 (describing how frequency of contact with male friends correlates with more serious violence among batterers); *supra* note 249 (describing research on the correlation between drug and alcohol abuse and battering).

539. See Braithwaite & Daly, *supra* note 1, at 200.

540. Navajo Peacemaking may use the coercive power of the state to ensure family attendance in Peacemaking. See PEACEMAKER CT. R. 1.5, in ZION & MCCABE, *supra* note 56, at 102 ("An order compelling individuals to submit to Peacemaker Court proceedings as parties, witnesses or participants is binding upon any member of the Navajo Tribe and any Indian living among the members of the Navajo Tribe."). While some family members may be subpoenaed as witnesses in informal processes that operate under the direction of the judiciary, it is unlikely that state power (outside American Indian nations) will have the same coercive reach as that of Navajo Peacemaker courts.

Drawing on Yamamoto's work on intergroup race apologies<sup>541</sup> as well as Navajo Peacemaking theory, such a process should encourage the batterer and his family and other support systems to recognize the harm caused by his behavior.<sup>542</sup> Peacemaking supports this recognition through the use of the victim's stories and those of her family and friends.<sup>543</sup> It also supports this recognition through the peacemaker's confrontation of denying and minimizing statements made by the batterer and his family.<sup>544</sup> Yamamoto's second step, "taking responsibility,"<sup>545</sup> will often require more extensive inquiry into the various tactics used by a batterer to control, intimidate, and harm his partner or ex-partner. This requires confrontation not only of statements that deny or minimize the violence, but also of statements that attempt to excuse or blame the violence on the victim's bad behavior. It requires a cataloguing of controlling behaviors.<sup>546</sup> This process cannot be accomplished solely through the use of an informal process, but it can begin there. Referrals to batterer's treatment, alcohol treatment, and spiritual healers or counselors must continue the process. The third step, "reconstruction,"<sup>547</sup> requires the concrete measures described above. *Nalyeeh*, or reparations after this thorough searching process, is much more than victim compensation. Reparations should include the resources, within the limits of availability, required to broaden the victim's autonomy.<sup>548</sup> More than a therapeutic intervention,<sup>549</sup> such a process would seek to restructure the power relationships between a man who batters and the woman he batters.

The Navajo "art and science of dealing with crime"<sup>550</sup> provides some valuable lessons for thinking about the future of anti-domestic violence work. Intervention strategies that broaden women's choices, that address their material and context-specific needs, are the strategies that will be most effective. Peacemaking is not perfect—no domestic violence intervention

541. See generally YAMAMOTO, *supra* note 1. It is no accident that Yamamoto's model shares elements with Navajo Peacemaking; his work draws on indigenous customary practices. See *id.* at 166–67.

542. See *supra* notes 217–219 and accompanying text.

543. See *supra* notes 207–210 and accompanying text.

544. See *supra* notes 208–215 and accompanying text.

545. YAMAMOTO, *supra* note 1, at 185.

546. Batterer's treatment programs frequently require abusive men to keep a log that records their controlling behaviors. See PENCE & PAYMAR, *supra* note 184, at 35–37.

547. YAMAMOTO, *supra* note 1, at 190–91.

548. See *id.* at 203 (describing reparations that can be transformative when "coupled with acknowledgment and apology" because they envision a "more just world").

549. Of course it is also a therapeutic intervention. See generally EDLESON & TOLMAN, *supra* note 250, at 97–98 (explaining why couples therapy, where the batterer has demonstrated a commitment to nonabuse over a period of time, may be helpful because it allows the woman to express her resentment regarding the abuse and facilitates her healing process).

550. Yazzie, *Navajo Peacekeeping*, *supra* note 21, at 100–01.

is perfect—but Peacemaking offers possibilities for women that are largely unavailable in other intervention strategies.

#### APPENDIX: RESEARCH NOTE ON PROBLEMS OF IMPERIALISM AND EMPIRICISM

There are two important concerns that constrain and potentially limit this Article's analysis. I refer to them as the "imperialism problem" and the "empiricism problem." The imperialism problem is that as an outsider, non-Navajo woman, I may engage in "overextended borrowing"<sup>551</sup> that either ignores important cultural differences<sup>552</sup> or, in the other extreme, exoticizes<sup>553</sup> or romanticizes<sup>554</sup> cultural difference.

Carole Goldberg warns that scholars who advocate the use of Peacemaking in non-Indian settings are engaged in "overextended borrowing" when they fail to recognize the extent to which Peacemaking is grounded in a Navajo spiritual world-view that is inapplicable in a "secular democratic system" with "myriad religious traditions."<sup>555</sup> I share Goldberg's skepticism

551. See generally Goldberg, *supra* note 43 (arguing that legal scholarship endorsing Peacemaking's use in non-Indian settings both romanticizes and ignores cultural distinctions critical to Peacemaking's use).

552. See Lisa Aronson Fontes, *Conducting Ethical Cross-Cultural Research on Family Violence*, in *OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE*, *supra* note 45, at 296, 298 (describing the "beta error" in family violence research whereby "members of all ethnic and cultural groups were treated as if the manifestations, effects, prevention and recovery from various types of family violence would follow from models and research developed for the most part by and with White Americans").

553. See HILDEN, *supra* note 60, at 99, 180–81 (describing the popular exoticization of Indianness in which Indians are questioned about the traditional or correct way to do daily activities and white shamans masquerade as Indian).

554. See Goldberg, *supra* note 43, at 1018; *infra* notes 556–557 and accompanying text (describing Renato Rosaldo's description of "imperial nostalgia"). The white invention of "American Indian Spiritualism" or new age Indian spiritualism provides a particular case in point of an extreme romanticization. See, e.g., CHURCHILL, *supra* note 22, at 355–65 (describing "American Indian Spiritualism"). One author notes that American Indian writers can, along with white writers, be subject to "the Romantic Fallacy" and give the impression that

Indians are without fail innocent and magical beings who have run afoul of fate and that the ways of tribal life were simple, stark, and pure, guided by a few simple philosophical principles and a transcendent comprehension of the laws of the universe which the Indians, in their simple but pure way, adhered to unflinchingly.

ALLEN, *supra* note 65, at 129.

555. See Goldberg, *supra* note 43, at 1016. I do not pretend to operate as an objective observer. What I do hope for is to operate with some sense of the limitations of my awareness. Goldberg expressed to me rather vividly just how difficult a task this can be. In response to what I believed to be the exoticization of Native practices, I noted that most of the Peacemaking session I observed was conducted in English and much of it felt, to me, like a directed therapy session. The peacemaker occasionally spoke in Navajo, and the two elderly participants spoke only in Navajo, with the peacemaker frequently translating for the benefit of younger participants whose

about whether Peacemaking may simply be "lifted" for use in non-Navajo settings. However, I am perhaps more optimistic that some of Peacemaking's processes may be useful in other settings.

In addition to ignoring important cultural differences, my work runs the risk of exoticizing or romanticizing difference. Anthropologist Renato Rosaldo describes the manner in which culture is seen only in those perceived as dissimilar and usually subordinate: "[T]he more power one has, the less culture one enjoys, and the more culture one has, the less power one wields."<sup>556</sup> Those with the "most" culture are often those "confined to marginal lands. Their cultural distinctiveness derives from a lengthy historical process of colonial domination; their quaint customs signal isolation, insulation, and subordination within the nation-state."<sup>557</sup>

I understand the Navajo judiciary's movement for greater reliance on Navajo common law in legal decision making and its move to create traditional methods of dispute resolution such as Peacemaking as overtly political acts,<sup>558</sup>

Navajo was limited. I also noted that my interview of the two peacemakers who participated in the session seemed to confirm my understanding. Goldberg gently suggested that I might have missed a great deal because of my inability to understand the statements made in Navajo, particularly the prayers. My confidence in my understanding of what transpired rendered unimportant the portion that I could least understand and, as Goldberg noted, these were perhaps the most important portions of the session. See Telephone Interview with Carole Goldberg, Professor, UCLA School of Law and Georgetown University Law Center (May 10, 1997) (notes on file with author).

556. RENATO ROSALDO, *CULTURE & TRUTH* 202 (1989). Thus, "culture" extends along a continuum from those at the lowest social rung, who do not have much of it, to those at the subordinate but slightly higher rungs, who have a great deal of it, to those at the "civilized" highest rungs who do not have "culture" at all. See *id.* at 198-202.

557. *Id.* at 199. This process is particularly evident in the dominant U.S. cultural understanding of American Indians. The "imperialist nostalgia" for the "dying (or dead) culture" (which stubbornly refuses to die) marks much of the popular understanding of Native practices, including legal practices. See *id.* at 69 ("[A]gents of colonialism . . . often display nostalgia for the colonized culture as it was 'traditionally' (that is, when they first encountered it) . . . [They yearn] for the very forms of life they intentionally altered or destroyed."); see also ALLEN, *supra* note 65, at 78 ("[P]opular and scholarly images of Indians as conquered, dying people had deeply affected American Indian self-perception . . ."). Justice Austin of the Supreme Court of the Navajo Nation writes, "Navajo common law is not something quaint or curious—it is alive and vibrant. It adapts to the present, and it will adapt to the future." Austin, *supra* note 4, at 48.

558. See, for example, Pommersheim, *supra* note 132, at 413, noting that:

[T]he greater necessity [for tribal courts] is that such decisionmaking craft a jurisprudence reflecting the aspiration and wisdom of traditional cultures seeking a future of liberation and self-realization in which age old values may continue to flourish in contemporary circumstances. Much of this effort, if successful, will aid in both decolonizing federal Indian law and building an indigenous vision of tribal sovereignty.

*Id.*; see also Valencia-Weber, *supra* note 135, at 245 ("The tribal courts creatively use indigenous customs and usages that survived the five-hundred-year encounter and struggle with Euro-American cultures. Despite the repeated efforts to destroy the cultural foundation of American Indian tribes, important customary principles persisted."). Chief Justice Robert Yazzie of the Supreme Court of the Navajo Nation and Justice Austin argue that Peacemaking is a part of this revival. See Interview with Raymond Austin, *supra* note 14; Interview with Robert Yazzie, *supra* note 14.

as well as acts of cultural and spiritual renewal.<sup>559</sup> They are part of a series of responses to the U.S. government's numerous intrusions on Navajo sovereignty.<sup>560</sup> They are not cultural relics but rather are self-conscious responses to the hegemony of U.S. culture and power.<sup>561</sup> Peacemaking addresses, in part, the internalized colonial realities of Navajo political life: the overincarceration of Native men in federal and state prisons,<sup>562</sup> the limits of Navajo Nation criminal jurisdiction,<sup>563</sup> the inadequate number of police and the

559. See, for example, *An Interview with Philmer Bluehouse*, *supra* note 21, at 169, noting that: As Navajos, we are reviving some of the learning [such as Peacemaking] that has withered away through our journey with the United States government. . . . We have got to go back and rediscover kinship, respect for nature, respect for human beings. We can't be continuing to go blindly down this path and fighting against each other.

*Id.* See also Interview with Raymond Austin, *supra* note 14, noting that:

[We] [u]se prayer in Peacemaking because prayer is part of the ceremony that comes from the holy people. It helps to purify your mind so that you can focus on the problems at hand. . . . You have to be in the right frame of mind to engage in prayer so that's why Peacemaking begins with prayer. It helps to set the right frame of mind. It says, "We are not here to find fault."

*Id.* See generally Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989) (discussing current challenges for the Navajo that include sovereignty challenges and challenges to cultural identity and existence).

560. For example, the U.S. government imposed the current tribal court system. More recently, the U.S. Congress imposed the Indian Civil Rights Act, 25 U.S.C. § 1302 (1994). See Austin, *supra* note 4, at 11.

561. See, e.g., Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 305 (1997) (arguing for strengthening Peacemaking traditions as a means of strengthening sovereignty); Zion & Yazzie, *supra* note 5, at 56 ("[M]ethods of A.D.R. must not be forced on Indian nations [by state and federal governments], as adjudication was.").

562. Just over 4% of the American Indian population is under correctional control. This compares with 2% of white adults, 9.8% of black adults, and less than 0.5% of Asian adults. See GREENFELD & SMITH, *supra* note 110, at 26. Of those under correctional control, 46% are incarcerated: 25% in local jails, 18% in state prisons, and 3% in federal prisons. By contrast, less than one third of correctional populations nationwide are confined in prisons or jails. See *id.* Programs similar in some respects to Peacemaking have been developed in part as a response to the overincarceration of Native men. See, e.g., Carol LaPrairie, *Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice?*, 6 CRIM. L.F. 576, 577 (1995) (noting that family group conferencing seeks to remedy the high imprisonment rate for aboriginals in Australia, which is more than 10 times that of nonaboriginals).

American Indian battered women's advocates warn that proponents of criminal justice intervention fail to understand that sentencing, probation, or diversion decisions that rest on prior convictions disproportionately affect Native men. Such convictions are often "alcohol related, driving or vehicle offenses, or theft, [which] may in fact be a consequence of poverty." BALZER ET AL., *supra* note 95, at 92.

563. See 18 U.S.C. § 1153(a) (stating that federal jurisdiction extends to the crimes of murder, manslaughter, kidnapping, rape, statutory rape, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny that occur on tribal lands). Tribal courts may impose sentences no longer than six months and fines of no more than \$500. See 25 U.S.C. § 1302.

unavailability of jail space,<sup>564</sup> and social realities including alcoholism and abusive childhood boarding school experiences.

A second imperialism problem arises from an instinct opposite to that of ignoring or exoticizing cultural difference: I may presume that non-Navajo expertise regarding domestic violence or adjudication is superior to Navajo expertise.<sup>565</sup> In conducting interviews for this study, I was aware of the fellowship among anti-domestic violence workers, a fellowship born in part by a feminist vision and an anti-domestic violence activists' language.<sup>566</sup>

I attempt to mediate some of these limitations by incorporating different perspectives and have succeeded, finally, in capturing at least two distinct perspectives: that of peacemakers and their allies (which are similar, but not entirely uniform) and that of anti-domestic violence advocates and social service providers who work with battered women and batterers.<sup>567</sup> Unfortunately, the stories of battered women and battering men who have participated in Peacemaking are filtered through the reports of anti-domestic violence advocates, peacemakers, and Peacemaking files.<sup>568</sup> Without first establishing a safety protocol and prior permission from participants, I judged it potentially too dangerous to victims for me to contact those participants whom my Peacemaking file reviews identified as being involved in domestic violence cases.<sup>569</sup>

564. See Yazzie, *Hozho Nahasdlii*, *supra* note 21, at 118 (“[O]n any given night, there is only one squad car to patrol an area as large as many counties of the American West.”).

565. Indeed, the latter imperialist move marks the history of Navajo legal institutions. See, e.g., Tso, *supra* note 559, at 225–26 (“The false assumption [of the Anglo world] is that the dominant society operates from the vantage point of intellectual, moral and spiritual superiority. The truth is that the dominant society became dominant because of military strength and power.”).

566. It was easy for me to feel at home with the anti-domestic violence activists. At the same time, I was eager to escape the limitations of this usual way of thinking in order to examine Peacemaking's potential. I therefore attempted to approach this work with a consciousness about myself. I found useful Rosaldo's advice to “explore . . . subjects from a number of positions, rather than being locked into any particular one.” ROSALDO, *supra* note 556, at 169. Rosaldo also notes that “the myth of detachment gives ethnographers an appearance of innocence, which distances them from complicity with imperialist domination.” *Id.* at 168–69. I did not pretend in my interviews to be a disinterested party. I presented myself as someone who had been involved in anti-domestic violence work for many years and who was interested in learning how Peacemaking was used in cases involving domestic violence.

567. See Interviews with Battered Women's Advocates, *supra* note 17 (describing women's experiences in Peacemaking); *supra* note 9 (describing my method of review of Peacemaking files in three locales). Other perspectives, including those of prosecutors and Navajo Nation court judges, are represented but not fully developed.

568. See *supra* note 9 (describing my method of review of Peacemaking files in two locales).

569. Such a study could be done but would require, in my view, the following: (1) identification of cases involving domestic violence; (2) a separate interview with the victim and the offender, which would include a request for permission to do follow-up; (3) information from the victims regarding “safe” follow-up, including phone numbers and addresses not shared with the abuser, or times to call or visit when he is not at home; (4) a safety protocol for making the follow-up phone

My final worry is empirical. Some of the benefits of Peacemaking that I identify may exist more in theory than in practice at this moment in Peacemaking's history in the Navajo Nation. There is a danger that readers will fasten on these potentials and support Peacemaking in domestic violence cases without regard to the cautionary warnings of battered women's advocates or without regard to whether the practice would further women's autonomy in a particular setting.<sup>570</sup>

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calls or visits; and (5) a meaningful assurance of confidentiality—a difficulty enhanced in rural settings such as those found in the Navajo Nation. For me, it would also require an interpreter who was not related to or known (or known well, at least) by either party. Additionally, I would crosscheck recidivism data with police and protection order filing records. See Harrell & Smith, *supra* note 324 (describing such a study of protection order effectiveness); see also Chaudhuri & Daly, *supra* note 243. There are many other difficulties in gathering accurate information, including the fact that some people will not want to be seen as critical of a traditional practice and so may not reveal that Peacemaking failed to work. Despite these difficulties, some have expressed interest in organizing such a study. See Interview with Philmer Bluehouse, *supra* note 15; Interview with James W. Zion, *supra* note 412.

570. Simply put, I ask myself if I would recommend Peacemaking to a friend. The answer is: It depends. I do not always recommend restraining orders or police complaints to friends who have been battered. It is always a matter of weighing the particular situation—how this action will hurt or help this woman.